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No. 01-___

In The

Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1008(a) of the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523, *codified at* 47 U.S.C. § 338(a), requires a provider of Direct Broadcast Satellite television to transmit the television broadcast signals of *all* requesting local television stations in a local market if the satellite carrier chooses to carry the signal of *any* local station in that same market pursuant to the copyright license granted pursuant to 17 U.S.C. § 122. The question presented is:

Does this "carry-one, carry-all" provision violate the First Amendment?

PARTIES AND CORPORATE DISCLOSURE

Petitioners are Satellite Broadcasting and Communications Association, EchoStar Satellite Corporation, EchoStar Communications Corporation, and DISH, Ltd., d/b/a DISH Network.

DIRECT Enterprises, Inc., DIRECTV Operations, Inc., and DIRECTV, Inc. were plaintiffs-appellants below, and are respondents in this Court pursuant to this Court's Rule 12.6.

Respondents are the Federal Communications Commission ("FCC") and the United States of America, respondents and appellees below; Michael K. Powell, FCC Chairman, in his official capacity, and FCC Commissioners Kathleen Q. Abernathy, Michael J. Copps, and Kevin J. Martin, in their official capacities, defendant-appellees below;[1] the United States Copyright Office, Library of Congress, James H. Billington, Librarian of Congress, in his official capacity, and Marybeth Peters, Register of Copyrights, in her official capacity, defendant-appellees below; and the National Association of Broadcasters,[2] the Association of Local Television Stations, Inc.,

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[1] The public officers named as parties in their official capacities in the cases below were then-Chairman William E. Kennard, and then-Commissioners Susan Hess, Harold Furchtgott-Roth, Michael K. Powell, and Gloria Tristani. Their successors in office have been substituted pursuant to this Court's Rule 35.3.

[2] In one of the consolidated cases below, Fourth Circuit Docket No. 01-1272, which concerned issues that are not the subject of this petition, the National Association of Broadcasters was a petitioner and Paxson Communications Corporation was an intervenor.

PARTIES AND CORPORATE DISCLOSURE – Continued

the Univision Network Limited Partnership and Univision Television Stations, Inc., the Association of America's Public Television Stations, the Public Broadcasting Service, the Corporation for Public Broadcasting, the Consumer Federation of America and the Office of Communication, United Church of Christ, Inc., intervenors below.

SBCA is a nonprofit national trade association, with no parent company and no publicly traded stock.

Petitioner EchoStar Satellite Corporation is a subsidiary of EchoStar Broadband Corporation, which in turn is a subsidiary of petitioner EchoStar Communications Corporation. Petitioner EchoStar Communications Corporation is a publicly held corporation that has issued securities to the public. Petitioner Dish, Ltd., has merged into EchoStar DBS Corporation. EchoStar DBS Corporation and EchoStar Broadband Corporation have also issued securities to the public. Financiere De Videocommunication owns 10 percent or more of petitioner EchoStar Communication Corporation's stock. Financiere De Videocommunication is a wholly owned subsidiary of Groupe Canal+, which in turn is a wholly owned subsidiary of Vivendi Universal. Vivendi Universal has issued securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Satellite Broadcasting and Communications Association ("SBCA"), EchoStar Communications Corporation ("EchoStar"), *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 275 F.3d 337 (4th Cir. 2001), and is reprinted in the Appendix ("App.") at 1a-66a. The opinion of the district court is reported at 146 F. Supp. 2d 803 (E.D. Va. 2001), and is reprinted at App. 75a-129a. The Order of the Federal Communications Commission ("FCC") ("FCC SHVIA Order") is reported at 16 F.C.C.R. 1918 (Nov. 30, 2000), and is reprinted at App. 134a-335a.

JURISDICTION

The Court of Appeals entered judgment on December 7, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." Sections 1002 and 1008 of the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523 ("SHVIA") are codified at 17 U.S.C. § 122 and 47 U.S.C. § 338, respectively, and are reprinted at App. 336a-358a.

STATEMENT

Petitioner EchoStar operates a Direct Broadcast Satellite ("DBS") television service, offering consumers an alternative to cable television.[1] In SHVIA, Congress provided DBS operators with a statutory copyright license enabling them to

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[1] The Court of Appeals set forth a detailed and thorough description of the nature and technological limits of satellite

offer subscribers their local broadcast television stations. Congress attached a condition, however, to the use of the license: if a DBS operator carries one local station in a television market, it must (subject to limited exceptions) carry all of the stations broadcasting in that market.

This case arises against the backdrop of Congress' imposition of a different must-carry requirement upon cable operators in the 1992 Cable Act and this Court's decisions upholding it, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). Analysis of the two forced-carriage requirements begins with the same premise: like cable system operators, satellite carriers exercise constitutionally protected editorial discretion in the selection of programming offered on their systems. *See* App. 27a (citing *Turner I*, 512 U.S. at 636-37).

But as the court below recognized, quite unlike cable operators, "[s]atellite carriers do not deny carriage to independent broadcasters for anticompetitive reasons." *Id.* at 56a. Indeed, the court emphasized that "[t]here is nothing anticompetitive about satellite carriers' efforts to make the most efficient use of their existing channel capacity." *Id.* Moreover, DBS operators serve only "about 13 percent of television households," whereas "[r]oughly 67 percent of television households currently subscribe to cable." *Id.* at 9a-10a (citing June 2000 data); *see also id.* at 10a n.3 (DBS market share now about 15 percent). Unlike cable operators, satellite carriers lack both the anticompetitive incentive and the market power to deny carriage to broadcasters for reasons unrelated to audience demand.

These differences between the cable industry and the satellite industry lie at the heart of this case. As explained by the court below, in the 1992 Cable Act, "Congress was concerned about anticompetitive practices"; cable systems

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television, as well as the legal and historical background of the industry. *See* App. 8a-19a.

not only "had bottleneck monopoly power over their subscribers' access to television signals," but also "had substantial economic incentives to abuse that power by denying carriage to local broadcast stations even when those stations were more popular with cable subscribers than some of the cable channels that replaced them." *Id.* at 53a-54a. In contrast, when it enacted SHVIA's "carry one, carry all" provision, "Congress lacked similar evidence of anticompetitive behavior by satellite carriers." *Id.* Because this Court's analysis of the cable must-carry statute controls and forecloses SHVIA's carry-one, carry-all restriction for satellite television, it is important to recall the relevant portions of the *Turner* decisions in some detail, before recounting the salient features of SHVIA and the proceedings below.

I. THE *TURNER* DECISIONS

1. Central to this Court's decisions in both *Turner* cases was the determination that imposition of must-carry on cable system operators was "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." 512 U.S. at 661. In *Turner I*, a five-to-four majority held that the cable must-carry requirement was content-neutral in both language and purpose and thus did not warrant strict First Amendment scrutiny. The majority relied upon "unusually detailed statutory findings" made after three years of congressional hearings, *id.* at 646, and repeatedly emphasized that (1) the cable medium had effective monopoly control over 60 percent of all television households, (2) cable system operators are to a great extent vertically integrated with producers of cable programming and thus compete for viewers with local broadcasters, and (3) cable operators also compete with broadcast stations for local advertising revenue. Thus, cable operators have both the market "power and the incentive to harm broadcast competitors," *id.* at 633, and therefore constitute a genuine threat to " 'the economic viability of free local broadcast television.' " *Id.* at 634 (quoting Cable Act).

These "special characteristics of the cable medium" convinced the *Turner I* majority that the Cable Act's must-carry requirement was distinguishable from other types of speech restrictions held by the Court to warrant strict scrutiny. First, Congress' findings regarding cable's market power and anticompetitive incentives showed that enactment of the cable must-carry provisions served a content-neutral purpose. The requirement was not "designed to favor or disadvantage speech of any particular content," but rather was "meant to protect broadcast television from what Congress determined to be unfair competition by cable systems." *Id.* at 652. Second, although the must-carry mandate constituted a "speaker preference" favoring broadcasters over cable channels, it did so not "based on the content of programming each group offers," but rather to protect the broadcast industry from "economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry." *Id.* at 658-59. The Court thus remanded the case for fact-finding under the *O'Brien* intermediate standard of scrutiny "applicable to content-neutral restrictions that impose an incidental burden on speech." *Id.* at 662.

2. When the case returned to this Court, a majority of the Justices, again divided five-to-four, upheld the must-carry requirement, concluding that it "advance[d] important governmental interests unrelated to the suppression of free speech and [did] not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. Cable must-carry was designed to serve three " 'interrelated interests' ": " '(1) preserving the benefits of free over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.' " *Id.* (quoting *Turner I*, 512 U.S. at 662). The *Turner II* majority was itself divided, however, with respect to the kind of threat to these governmental interests that is necessary to justify the must-carry requirement's infringement on First Amendment freedoms.

A plurality found substantial evidence to support Congress' judgment that the anticompetitive predations of cable

operators posed a "real threat justif[ying] enactment of the must-carry provisions." *Id.* at 196 (plurality opinion). Absent must-carry, " 'significant numbers of broadcast stations [would] be refused carriage on cable systems,' and those 'broadcast stations denied carriage would either deteriorate to a substantial degree or fail altogether.' " *Id.* at 191-92, (quoting *Turner I*, 512 U.S. at 666). Echoing the *Turner I* majority, the *Turner II* plurality emphasized the cable medium's dominant "market power over local video programming markets," *id.* at 197, its extensive vertical integration with programmers, *id.* at 198, and its competition for advertising revenue with local broadcasters, *id.* at 200-01. In light of cable's "systemic reasons for seeking to disadvantage broadcast stations," it was reasonable for Congress to "conclude that cable systems would drop broadcasters in favor of programmers – even unaffiliated ones – less likely to compete with them for audience and advertisers." *Id.* at 201-02; *see also id.* at 225 (Stevens, J., concurring).

Justice Breyer provided the fifth vote to uphold the must-carry requirement, but he eschewed reliance on the plurality's "anticompetitive rationale." *Id.* at 225 (Breyer, J., concurring in part). Whether the must-carry requirement "does or does not sensibly compensate for some significant market defect," Justice Breyer concluded that it was justified simply because it "seeks to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming," and thus serves the government's purpose of promoting " 'access to a multiplicity of information sources.' " *Id.* at 226 (Breyer, J., concurring in part) (quoting *Turner I*, 512 U.S. at 663).

II. SHVIA'S CARRY-ONE, CARRY-ALL REGIME

1. SHVIA was enacted in order to correct an unfair "competitive advantage" that cable systems enjoyed over satellite carriers. App. 11a. Specifically, cable operators enjoyed a statutory license "to retransmit broadcast television signals without securing authorization from program copyright holders." App. 13a. By contrast, prior to the enactment of SHVIA, satellite carriers had no statutory license authorizing local-into-local retransmission of broadcast

signals. Because a broadcaster's signal is subject to innumerable underlying copyrights governing "each of the programs, advertisements, and music aired by that station" 24 hour per day, 365 days per year, FCC SHVIA Order ¶ 15, App. 153a, satellite carriers were effectively precluded from offering their subscribers the programming of local broadcast channels. Accordingly, Congress created a statutory copyright license authorizing satellite carriers to retransmit local television broadcast signals to their subscribers in that station's local market. 17 U.S.C. § 122, App. 336a.

However, Congress conditioned use of the statutory copyright license to carry any one station in a local market upon carriage of *all* stations in that market. 47 U.S.C. § 338(a), App. 344a-345a. This "carry one, carry all" regime divests a satellite carrier of any editorial discretion over the selection of broadcast programming in any market in which it chooses to offer local broadcast programming. A satellite carrier choosing to carry a single local station in, say, the New York City area, must also carry all 21 additional eligible stations as well. Given the technological and economic limitations on the channel capacity of satellite carriers, App. 10a-11a, SHVIA's forced-carriage mandate thus forces satellite carriers to provide local-into-local coverage to fewer markets than would be served in the absence of the mandate. As the Fourth Circuit put it, rather than "allow[ing] satellite carriers to cherry pick [i.e., exercise their editorial discretion] by retransmitting *some* stations (the major network affiliates) in *many* markets," Congress chose to "allow[ ] satellite carriers to retransmit *all* of the stations in *some* markets." App. 23a (emphasis in original).

2. The animating purpose of SHVIA's carry-one, carry-all regime is openly avowed in the measure's legislative history – simply to protect independent local broadcast stations from what the Court of Appeals called the "practical realities of the television marketplace." App. 21a. Congress candidly acknowledged that the provision was designed to

> prevent[ ] satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.

H.R. CONF. REP. NO. 101-464 (1999) ("Conference Report") at 101, App. 362a.

Concerned that the program content of independent local stations typically lacks strong viewer demand in the marketplace, Congress determined that unless satellite carriers were forced to retransmit the programming of such stations, satellite subscribers would not expend any effort to "obtain over-the-air signals from independent broadcast stations." *Id.* at 102, App. 363a. The purpose of this restriction was "to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." *Id.* at 101, App. 362a. As the Court of Appeals observed, Congress believed that the forced-carriage mandate was necessary "to provide [over-the-air] viewers with a rich mix of broadcast programming from multiple sources." App. 37a.

III. PROCEEDINGS BELOW

Petitioner EchoStar operates one of the Nation's two DBS services. Petitioners, along with the Nation's other DBS provider, DIRECTV, Inc., brought this action in the district court, seeking declaratory and injunctive relief against SHVIA's carry-one, carry-all mandate.[2] Because EchoStar

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[2] DIRECTV joined petitioners in appealing the district court's decision to the Fourth Circuit, but has chosen not to seek certiorari; accordingly, DIRECTV is a respondent pursuant to this Court's Rule 12.6. While this case was pending before the Court of Appeals, EchoStar and the parent of DIRECTV agreed to merge the two DBS providers into one entity. The merger is subject to approval by the FCC and antitrust regulators. After the entry of the decision below,

and DIRECTV hold the licenses for all 96 available frequencies for the provision of DBS service across the continental United States, *see* App. 10a, the Fourth Circuit's decision will finally decide the constitutionality of SHVIA's carry-one, carry-all requirement absent review in this Court. All parties currently subject to the restriction are bound by the decision below.

Following discovery and the submission of cross-motions for summary judgment, the district court granted respondents' previously filed motions to dismiss. App. 75a-129a. Separately, petitioners SBCA and EchoStar had filed petitions for review of the FCC SHVIA Order. The Fourth Circuit consolidated the petitions for review with petitioners' appeal of the district court's decision dismissing their complaint. On December 7, 2001, the court affirmed the dismissal of petitioners' district court complaint, and denied the petitions for review.

1. The Fourth Circuit first addressed the level of First Amendment scrutiny applicable to the carry-one, carry-all regime. The court rejected petitioners' submission that "the carry one, carry all rule is content-based on its face because its burdens are triggered by a satellite carrier's decision to transmit certain content, namely, the signal of a local television station." App. 30a. The court reasoned that "[a] satellite carrier that privately negotiates the required copyright clearances can retransmit the signal of a local broadcast station without incurring any carriage obligations." *Id.*

2. Having concluded that the carry-one, carry-all regime is content-neutral, the panel applied intermediate scrutiny. Throughout its opinion, the Court of Appeals repeatedly recognized that "the government interests served by the carry one, carry all rule are best characterized as a

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EchoStar and DIRECTV announced that the additional capacity that would be generated if the merger is approved would enable them to offer local-into-local service to all markets nationwide as soon as 2 years later. However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld.

single interest in preserving a multiplicity of broadcast outlets for over-the-air viewers." App. 36a-37a; *see also id.* at 21a (Congress sought "to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services"); *id.* at 8a, 24a, 35a, 36a.

The Court of Appeals acknowledged that in *Turner II* this Court held that, to demonstrate that cable must-carry materially advanced the government's interest in preserving over-the-air broadcast outlets, the government must show that absent must-carry a significant number of broadcast stations would not be carried by cable and would " 'deteriorate to a substantial degree or fail altogether.' " App. 44a (quoting *Turner II*, 520 U.S. at 208). The court did not dispute petitioners' submission that the government cannot possibly satisfy this standard. Instead, the panel refused to apply "the substantial deterioration standard" adopted by this Court, holding that it "does not work here because that standard was formulated to address a situation where the market for subscription television services was dominated by a single medium." *Id.* at 45a.

The court below thought that "[i]t is more sensible to allow Congress the latitude to view the regulatory landscape as a whole by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects." *Id.* at 47a-48a. Accordingly, because "Congress surely had a substantial basis for concluding that satellite would soon become a significant challenger to cable," the panel held that "Congress reasonably concluded that the carry one, carry all rule addressed a real threat to the government's interest in preserving a multiplicity of broadcast outlets for over-the-air viewers." *Id.* at 48a.

As part of its intermediate scrutiny analysis, the court also introduced a second interest supposedly served by the forced-carriage mandate: "preventing [Congress'] grant of a statutory copyright license . . . from undermining competition in local markets for broadcasting advertising." *Id.* at 35a.

In contrast to Congress' well-documented interest in promoting multiplicity, the Fourth Circuit cited nothing in the legislative record indicating that Congress enacted the carry-one, carry-all requirement to serve this interest.[3] Absent a forced-carriage rule, the court believed that SHVIA's statutory copyright license would allow satellite carriers to "pick winners and losers in local advertising markets." *Id.* at 50a. The court held that this interest was sufficiently substantial to justify the restriction upon petitioners' speech. *Id.*

3. The Court of Appeals gave "separate consideration" to the central distinction between this case and the *Turner* cases: whereas Congress "had substantial evidence that cable operators had bottleneck monopoly power . . . [and] substantial economic incentives to abuse that power," it "lacked similar evidence of anticompetitive behavior by satellite carriers." *Id.* at 53a-54a. Unlike satellite carriers, cable companies compete with local broadcasters for local advertising revenue. *Id.* Also, satellite carriers are not significantly "vertically integrated," meaning they do not own nor are they affiliated with companies that produce television programming. *Id.*[4] Rather, as the Court of Appeals recognized, given the limited channel capacity of satellite carriers, and given that the programming of broadcasters affiliated with major networks is typically far more popular with viewers than the programming of independent stations, *see id.* at 56a, the "practical realit[y] of the television marketplace" is that "the economically rational choice for satellite carriers is to

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[3] The Court of Appeals did refer to the testimony of a broadcaster taken by a House committee over a year prior to the enactment of SHVIA, *see* App. 50a, but there is no indication that anyone in Congress shared the concern expressed in the testimony.

[4] After the court below issued its opinion, Vivendi Universal, a programming producer and distributor, acquired a 10.7 percent interest in EchoStar. This transaction does not alter the basis on which the Court of Appeals decided the case, for it recognized that satellite carriers "are not vertically integrated with non-broadcasting sources *to any significant degree.*" App. 54a (emphasis added).

cherry pick the major network affiliates in markets where the carriers offer local-into-local service." *Id.* at 21a, 42a. Finally, again unlike cable operators, satellite carriers lack significant market power that would enable them to inflict anti-competitive harm even if they were so inclined.

The Court of Appeals conceded that petitioners' submission that these key differences in the cable and satellite media are outcome determinative "cannot be summarily rejected, for it is not immediately clear whether or how the holdings in the *Turner* cases depend on evidence of anticompetitive practices in the cable industry." *Id.* at 54a-55a. Nevertheless, noting that Justice Breyer "provid[ed] the fifth vote to uphold the must-carry rules without relying on the claim that the rules 'sensibly compensate for some significant market defect,' " the court held that "the theme of preserving broadcast television is more fundamental than the theme of preventing unfair competition." *Id.* at 55a (quoting *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part)).

REASONS FOR GRANTING THE PETITION

In the *Turner* cases, this Court recognized that the must-carry provisions of the 1992 Cable Act implicated "the heart of the First Amendment . . . [,] the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. For this reason, the Court subjected them to close First Amendment analysis before upholding them. Three features of the Cable Act were central to the Court's ultimate conclusion, yet in upholding SHVIA's forced-carriage requirement, the Court of Appeals treated all three as unnecessary to the result.

First, both *Turner* decisions repeatedly emphasized that the must-carry regime was "justified by the special characteristics of the cable medium: the bottleneck *monopoly* power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661 (emphasis added). Indeed, only one Member of the Court voted to uphold the statute without regard to the "anticompetitive rationale" relied upon by the plurality. *Turner II*, 520

U.S. at 225 (Breyer, J., concurring). In this case, the Fourth Circuit acknowledged that this justification does not exist, but nevertheless held that "if satellite carriers threaten the government's interest in preserving a multiplicity of local broadcast outlets, it does not matter whether the threat can be traced to anticompetitive practices by those carriers." App. 55a.

The court below expressly adopted Justice Breyer's broad conclusion that the First Amendment permits Congress to restrict editorial discretion solely in order to promote "a multiplicity of information sources" without regard to "[w]hether or not the statute does or does not sensibly compensate for some significant market defect." 520 U.S. at 226 (Breyer, J., concurring in part). No other Member of this Court has ever concluded that Congress may exact the "serious First Amendment price" entailed in "interfer[ing] with the protected interests of the cable [and satellite] operators to choose their own programming," *id.*, merely to promote a multiplicity of speakers in a properly functioning marketplace of ideas.

The Fourth Circuit's ruling, if left unreviewed, grants Congress a blank check to suppress speech whenever it concludes that the marketplace of ideas needs a larger or more diverse rostrum of speakers, without regard to whether the marketplace is infected with dysfunction. We respectfully submit that if allowed to take root, the decision below not only extinguishes petitioners' First Amendment right to choose "what to say and what to leave unsaid," *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion), but also places the First Amendment editorial freedom of all other speakers – from bookstore owners and magazine publishers to movie theater operators and parade organizers – at the regulatory mercy of any government body with a claimed interest in promoting a "multiplicity of information sources."

Second, the *Turner I* Court concluded that the cable must-carry restriction was content-neutral because all cable operators were uniformly required to carry all local stations, "regardless of the programs or *stations* they now offer or

have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs or *stations that cable operator has selected or will select.*" 512 U.S. at 644 (emphases added). In stark contrast, the carry-one, carry-all burden imposed by SHVIA applies if, but only if, the satellite operator chooses to offer one or more broadcast stations in a particular market. This Court has never before upheld a speech-triggered interference with the "editorial discretion over which stations . . . to include in [a cable or satellite operator's] repertoire," which the Court has held is "entitled to the protection of the speech and press provisions of the First Amendment." *Id.* at 636 (citation and internal quotation omitted).

Third, the *Turner II* Court concluded that the cable must-carry restriction survived intermediate scrutiny because Congress had substantial evidence demonstrating that, absent the restriction, " '*significant numbers* of broadcast stations will be refused carriage on [satellite] systems,' and those 'broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.' " *Turner II*, 520 U.S. at 191-92 (citation omitted) (emphasis added). The must-carry restriction on the speech of cable operators thus actually advanced Congress' interest in preserving a multiplicity of over-the-air broadcast stations. The court below, however, "reject[ed] the . . . argument that substantial deterioration of non-carried broadcast stations is always the proper standard for deciding when carriage rules are justified." App. 45a. "It is more sensible," the court thought, "to allow Congress the latitude to view the regulatory landscape as a whole by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects." App. 47a-48a. In other words, SHVIA's restriction on satellite carriers' speech need not actually advance the objective of preserving over-the-air television because Congress had substantial evidence justifying a must-carry speech restriction on *cable operators*.

But this Court has never upheld a statute burdening free speech on the basis of congressional findings underlying a

different statute regulating a *different* medium possessing *different* market characteristics. Such a rule would eviscerate the bedrock First Amendment requirement that "[a] regulation cannot be sustained if it provides only ineffective or remote support for the government's purpose, or if there is little chance that the restriction will advance the State's goal." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 2428 (2001) (internal quotations and citations omitted).

Each of these departures from this Court's reasoning in the *Turner* cases breaks new ground in First Amendment jurisprudence. Absent review, the Fourth Circuit's decision will be the final word of the Judicial Department on whether SHVIA comports with the First Amendment, for all DBS operators currently subject to the restriction are bound by the decision below. *See* App. 10a. For that reason alone, certiorari is warranted; the validity of a statute affecting satellite television programming nationwide should be determined finally by this Court.

But the Fourth Circuit's sweeping transgression of the limits carefully drawn in the two *Turner* opinions cannot be confined to the satellite television medium. No communications medium is safe if Congress possesses the authority (i) to restrict editorial discretion simply and solely to promote a multiplicity of speakers in a genuinely open and competitive marketplace of ideas, *cf. Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . "); (ii) to impose a burden on speech that is triggered solely by the exercise of editorial discretion, *cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (speech-triggered burden on editorial discretion is unconstitutionally content-based); and (iii) to impose on the speech of one medium a burden that does not advance its stated purpose simply because a different restriction, targeted at different speakers possessing different market characteristics, does advance that interest, *cf. Turner I*, 512 U.S. at 664 (government bears burden of demonstrating that restriction

on speech "will in fact" advance its purpose "in a direct and material way").

I. THE COURT BELOW AUTHORIZED CONGRESS TO RESTRICT SPEECH IN ORDER TO PROMOTE A MULTIPLICITY OF SPEAKERS DESPITE THE ABSENCE OF ANY DYSFUNCTION IN THE MARKETPLACE OF IDEAS.

1. This Court devoted substantial portions of its opinions in *Turner I* and *Turner II* to the proposition that the cable must-carry restriction was "justified by the special characteristics of the cable medium." *Turner I*, 512 U.S. at 661. The Court recounted in detail Congress' findings demonstrating that cable operators have both the market power and the economic incentives to deny carriage to broadcast stations for anticompetitive reasons. *See id.* at 632-34, 646-47, 658-59, 660-61; *Turner II*, 520 U.S. at 191, 197-208.

This understanding of the government's interest was central both to the Court's analysis of the appropriate level of First Amendment scrutiny in *Turner I*,[5] and to the plurality's analysis of whether the restriction survived intermediate scrutiny in *Turner II*.[6] Only Justice Breyer deemed

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[5] *See* 512 U.S. at 646-49 (must-carry restriction did not have content-based purpose because it sought "to prevent cable operators from exploiting their economic power to the detriment of broadcasters"); *id.* at 657-59 (speaker preference based upon medium (favoring broadcasters over cable programmers) not content-based where Congress believed "the physical characteristics of cable transmission and the economic incentives facing the cable industry" imperiled broadcast stations); *id.* at 660-61 (imposition of must-carry restriction on cable, but not other multi-channel services, did not warrant strict scrutiny because other services do not possess "bottleneck monopoly power").

[6] *See* 520 U.S. at 196-208 (plurality opinion) (relying upon extensive evidence demonstrating cable's market power and economic incentives to deny carriage for anticompetitive reasons to

the plurality's extensive development of the "anticompetitive rationale" to be superfluous. *Turner II*, 520 U.S. at 225-26 (Breyer, J., concurring in part).

The Court of Appeals candidly acknowledged that SHVIA's carry-one, carry-all restriction cannot be justified on the basis of any market dysfunction like that found in the *Turner* decisions. App. 53a-56a. Indeed, the court conceded that satellite carriers seek to make the most efficient use of their limited channel capacity and that their "cherry picking" of local stations is governed solely by viewer demand. *Id.* at 56a. SHVIA itself, however, employs a classic anticompetitive "tying" arrangement for the acknowledged purpose of propping up independent broadcasters that lack sufficient viewer demand to succeed in a genuinely open and competitive market. Thus, SHVIA's carry-one, carry-all regime does not correct a defect in the market for ideas, *it creates one.*

At bottom, the court below concluded that the *Turner* Courts' discussion of the anticompetitive justification for the cable must-carry mandate, consuming some 15 pages in the United States Reports, was wholly irrelevant to the outcome, and that cable must-carry would have been upheld even if cable operators had lacked monopoly power, had not been vertically integrated with cable programmers, and did not compete with local broadcasters for advertising revenue. *See* App. 55a-56a. To the Court of Appeals, the First Amendment makes no distinction between a denial of carriage resulting from the anticompetitive predations of a market monopolist and a denial of carriage resulting from the standard exercise of editorial discretion to make the most efficient use of limited communications capacity in an open and competitive market for ideas.

The implications of such authority are breathtaking. May the government require bookstores to devote a specified percentage of shelf space to local authors simply because it is

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conclude that must-carry restrictions were justified by a "real threat").

dissatisfied with the limited selection available in a marketplace increasingly dominated by the *New York Times* best-seller list? May a municipality, concerned about the lack of diversity in an annual parade through its streets, condition a permit on the organizer welcoming all local organizations, regardless of their message? May a zoning permit for construction of a multiplex theater be conditioned on the reservation of a certain number of screens for works of independent or local film producers?

2. This Court has never suggested that a naked interest in promoting a "multiplicity" of speakers, in the absence of a dysfunction in the marketplace of ideas, could justify a governmental restriction on editorial discretion (or any other suppression of speech). To the contrary, this Court's First Amendment jurisprudence repudiates this notion.

The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley*, 424 U.S. at 48-49. Therefore, Congress may not burden the speech of more popular network affiliates (or a satellite carrier's editorial choice to carry such stations) in order to enhance the speech of less popular independent stations. It is simply not the government's place to override market-driven editorial choice in order to ensure a continuing audience for speakers whose message is not popular enough to compete on its own. Thus in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), this Court reversed a lower court order that compelled a broadcaster to allow a relatively unpopular political candidate to participate in a forum. *See id.* at 682-83 ("Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest"); *see also Pacific Gas & Elec.*, 475 U.S. at 14 (plurality opinion); *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-59 (1986); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981).

The exception to this rule against government interference in the marketplace of ideas arises when market dysfunction interferes with the free flow of speech. Thus, in *FCC*

v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), this Court distinguished *Buckley* and upheld a rule barring a newspaper owner from owning broadcast stations in the same market. In dealing with the unique problems of the traditional broadcast industry and the threat to free speech presented by undue concentration of media control within a given local market, Congress was not restricting the speech of some to promote the speech of others, but simply acting to correct a *malfunctioning* marketplace. *Id.* at 799-801 & n.18.

Similarly, in *Turner I*, the Court reaffirmed the *Buckley* principle, 512 U.S. at 657-58, and acknowledged that the cable must-carry rules distinguished among speakers so as to favor some over others, *id.* at 644-45. But because Congress was concerned with preserving a multiplicity of voices from the threat of *unfair* competition by vertically integrated cable monopolies, *id.* at 646-48, the market correction was justified. This Court has unanimously read *Turner I* as turning on the existence of a severe market dysfunction created by cable's "monopolistic autonomy." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577 (1995).

The "marketplace of ideas" is the most familiar First Amendment metaphor because it embodies the most enduring and fundamental of First Amendment principles. Diversity and a multiplicity of voices are, to be sure, important virtues in a marketplace of ideas. But under the First Amendment, such ends are achieved by ensuring a free and open marketplace in which programs and ideas can compete vigorously for the ear of the audience. After all, Justice Holmes' vision of "a free trade in ideas" in which "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), is fundamentally at odds with the notion that Congress may override the free market's rejection of speech in order to create a marketplace more to its liking. For this reason, it has always been "a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (plurality

opinion). The governmentally dictated multiplicity of SHVIA, overriding the audience's own choices in order to achieve diversity by state command, is more reminiscent of the Maoist doctrine of "let a thousand flowers bloom." Such an approach is wholly alien to our Constitution.

3. The court below seized upon this Court's statement in *Turner II* that " '[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anti-competitive animus or rises to the level of an antitrust violation.' " App. 55a (quoting 520 U.S. at 194). But this observation cannot be understood to adopt the view expressed by Justice Breyer in his separate opinion rejecting the plurality's reliance upon the "anticompetitive rationale" for upholding cable must-carry. In this passage, the Court merely observed that, to justify overriding First Amendment rights in order to promote diversity, there must be some "conduct" that threatens multiplicity; the rest of the *Turner* opinions makes plain that the conduct must threaten to distort the marketplace of ideas, even if it does not rise to the level of a cognizable antitrust violation.

Thus, this Court's First Amendment jurisprudence has not read the Sherman Act into the Constitution; Congress is not handcuffed by its own antitrust laws when acting to ensure the free flow of information in a dysfunctional marketplace of ideas. But just as assuredly, Congress *is* handcuffed by the First Amendment when it regulates a genuinely open and competitive speech marketplace to ensure the perpetuation of certain voices that Congress values but the audience – the consumers in that marketplace – does not. However much "federal policy favors multiplicity," Congress surely may not stifle "conduct" that "threatens" multiplicity when the conduct in question is not predatory monopolistic behavior, but is instead the very ebb and flow of free market forces (audience demand, speaker response) that the First Amendment was designed to protect.

The cases cited by the *Turner II* Court in support of the quoted passage merely confirm that fostering a diversity and

multiplicity of voices in the marketplace of ideas are important governmental interests. But *none* of these cases (or any other decision of this Court) have ever held that this purpose *alone* can sustain (even under intermediate scrutiny, let alone strict scrutiny) a regulation that trenches upon First Amendment rights. The cited cases either involved the controversial *Red Lion* standard applicable only to radio and television broadcasters, or presented no First Amendment issue at all. *See National Broad. Co. v. United States*, 319 U.S. 190, 227 (1943) (upholding, on basis of scarcity of radio spectrum, various FCC regulations about station affiliation and ownership); *National Citizens Comm. For Broad.*, 436 U.S. at 799 (upholding, under *Red Lion*, FCC limits on television-newspaper cross-ownership); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (Court declined to address First Amendment issue); *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-69 & n.27 (1972) (plurality opinion) (no First Amendment issue in case); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (upholding, under *Red Lion*, policy of relying on market forces to ensure diversity in radio station formats).[7]

In sum, SHVIA's carry-one, carry-all regime restricts the editorial discretion of satellite carriers and burdens the speech of popular broadcasters in order to promote the speech of unpopular competing broadcasters. SHVIA's preference for the programming of independent broadcast stations is thus a speech preference *for its own sake*. A writ of certiorari is warranted, not only to preserve an important national television medium's First Amendment right to choose "what to say and what to leave unsaid," *Pacific Gas & Elec.*, 475 U.S. at 11 (plurality opinion), but also to protect the editorial freedom of all other speakers from infringement by

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[7] Indeed, *FCC v. WNCN* confirmed, at great length, "that market forces were the best available means of producing diversity," and that "the market is far more flexible than governmental regulation and responds more quickly to changing public tastes." 450 U.S. at 590; *see also FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

any government body with a claimed interest in promoting a "multiplicity of information sources."

II. THE COURT OF APPEALS DISREGARDED THIS COURT'S PRECEDENTS CONCERNING THE APPLICATION OF STRICT SCRUTINY.

A. Speech-Triggered Restrictions on Editorial Discretion Are Content-Based.

Although the *Turner I* Court found that the cable must-carry requirement "interfere[d] with cable operators' editorial discretion," it held that the requirement was not content-based on its face because all cable companies were uniformly required to carry all local stations, "regardless of the programs or *stations* they now offer or have offered in the past." 512 U.S. at 643-44 (emphasis added). The Court emphasized that "[n]othing in the [Cable] Act imposes a restriction, penalty or burden by reason of the views, programs or *stations that cable operator has selected or will select.*" *Id.* at 644 (emphasis added). A cable operator, therefore, "cannot avoid or mitigate" its must-carry obligation "by altering the programming it offers to subscribers." *Id.*

The Court did not choose these words by accident: "stations" are categorized with "programs" because both are *content*. A television station is to its programs what a magazine is to its articles. And television viewers select television stations for the same reason that magazine readers select magazines – because of their *content.* Like a magazine, a television station is defined by, and has no meaningful identity apart from, its content. *Turner I* recognized that because selection of a local station for carriage (like selection of an article for magazine publication) is inherently content-based, it follows that a regulatory burden triggered by that selection is also inherently content-based. *Id.* at 643-44, 653-55.

SHVIA's conditional forced-carriage requirement, in contrast to the mandatory across-the-board cable carriage requirement at issue in *Turner*, is on its face entirely dependent upon the "*stations* the [satellite] operator has selected or will select." *Id.* at 644 (emphasis added). Forced carriage of unwanted local stations is required in a given market if, and

only if, the satellite carrier offers the programming of one or more wanted local broadcasters in that market. Thus, a satellite carrier, unlike a cable operator, "*can* avoid or mitigate" SHVIA's forced-carriage requirements "by altering the programming it offers to subscribers." *Id.*

SHVIA is thus materially indistinguishable from the right-of-reply statute struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Because a newspaper's statutory obligation to "grant access to the messages of others" was triggered by the content of the newspaper, this Court struck it down as a content-based "intrusion on the newspaper's 'editorial control and judgment.' " *Turner I*, 512 U.S. at 653 (quoting *Tornillo*, 418 U.S. at 258).

The Court of Appeals never even cited *Tornillo*, let alone tried to distinguish it. Rather, the Fourth Circuit suggested that "SHVIA's carriage obligations are not triggered *simply* by the decision to carry a local broadcast station in a given market," but rather "are triggered by the decision to carry that station *by making use of the § 122 license.*" App. 30a (emphasis in original). Because a "satellite carrier that privately negotiates the required copyright clearances can retransmit the signal of a local broadcast station without incurring any carriage obligations," the court believed that the forced-carriage requirement depends not on a "satellite carrier's choice of content, but on its decision to transmit that content by using" the statutory copyright license. *Id.* at 30a-31a.

The suggestion that satellite carriers may avoid the restriction on their editorial discretion by privately negotiating the thousands of copyright clearances required for even a single day of programming is both legally and factually wrong. As an initial matter, petitioners specifically alleged in their complaint that it is an "almost insuperable practical problem" to negotiate retransmission agreements with each individual owner of every copyrighted work contained within a local television broadcast station's programming. Complaint ¶ 37, App. 365a. This appeal arises from the district court's decision granting respondents' *motion to dismiss*, and so the allegations in the complaint must be

accepted as true. *E.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. ___ (2002), slip op. at 1 n.1. The refusal of the court below to accept that allegation as true alone mandates reversal.

But petitioners' complaint is hardly the only source for the proposition that, as a practical matter, retransmission of local television broadcast stations is not possible for any multi-channel television service provider without a statutory copyright license. The FCC itself acknowledged that in order to carry even a single broadcast station absent a statutory license, a satellite carrier would have to negotiate individual clearances with the countless "copyright holders of each of the programs, advertisements, and music aired by that station," 24 hours per day, 365 days per year. FCC SHVIA Order ¶ 15, App. 152a-153a. Both Congress and this Court have recognized that "cable operators would face virtually insurmountable technical and logistical problems if they were required to block out all programs as to which they had not directly obtained copyright permission from the owner." *Crisp*, 467 U.S. at 709 n.13 (citing legislative history to 1976 amendments creating statutory license for cable). No carrier, satellite or cable, has *ever* been able to secure such clearances, despite their enormous economic incentive to do so.

In fact, SHVIA owes its very existence to this practical reality, for Congress recognized that without the statutory license, satellite carriers could not provide local television stations to their subscribers. *See, e.g.*, Conference Report 93, App. 360a ("[S]ection 122 license allows satellite carriers *for the first time* to provide their subscribers with the television signals they want most: their local stations.") (emphasis added). Indeed, the Fourth Circuit itself repeatedly acknowledged this practical reality. *See* App. 49a (Congress recognized "that satellite carriers needed a statutory copyright license to be able to compete with cable."); *id.* at 13a-14a; *id.* at 18a ("high transaction costs of obtaining the rights to retransmit broadcast" signals effectively precluded local service); *id.* at 20a (same).

Moreover, there is no doubt that SHIVA's copyright license is, at the very least, a valuable benefit to satellite

carriers, and the Constitution does not permit Congress to condition such a benefit on the surrender of a constitutionally protected right. *See, e.g., Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541-47 (2001). Congress can no more condition SHVIA's copyright license on a surrender of satellite carriers' editorial freedom than the City of Boston can condition a permit for the St. Patrick's Day parade on the parade organizers' inclusion of groups whose messages the organizers do not wish to convey. *Cf. Hurley*, 515 U.S. at 559. In *Hurley*, forced inclusion of unwanted speakers could not be justified even by a sovereign State's weight interest in enforcing its civil rights laws. Here, *a fortiori*, SHVIA's forced inclusion of unpopular local broadcasters cannot be justified by a congressional desire to promote voices that have failed to garner an audience in an open and properly functioning marketplace of ideas.

B. SHVIA's Purpose Is Content-Based.

Strict scrutiny is appropriate here for the independent reason that the purpose of the carry-one, carry-all requirement relates to the content of speech. *See Turner I*, 512 U.S. at 643. As the court below conceded, Congress enacted the restriction "to promote the survival of independent broadcast stations," App. 31a, because those stations – and those stations alone – were threatened by the "practical realities of the television marketplace." *Id.* at 21a. Unhappy with the natural functioning of the marketplace, Congress "targeted [satellite] television in a purposeful attempt to interfere with its First Amendment activities," *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) – namely, editorial choices made in conformity with audience demand.

Regulation that overrides editorial choice in order to favor certain speakers over others within the same medium engenders "risk . . . similar to that from content-based regulation: It will distort the market for ideas," and thus warrants strict scrutiny. *Id.*; *see also Turner I*, 512 U.S. at 658-60. Indeed, if SHVIA's tying arrangement were unrelated to the relatively unpopular programming of independent broadcasters, "there would have been no perceived need for

Congress to 'equalize the relative ability' " of those stations to reach viewers in an open and competitive market. *Turner I*, 512 U.S. at 658 (quoting *Buckley*, 424 U.S. at 48).

The court below refused to apply strict scrutiny because it deemed this aspect of SHVIA to be indistinguishable from cable must-carry. The latter, we are told, also "primarily benefited independent broadcast stations," as the *Turner* Court "understood perfectly well." App. 31a. But in *Turner*, Congress had not discriminated "among different speakers within a single medium." *Turner I*, 512 U.S. at 659. In contrast, as the court below conceded elsewhere in its opinion, SHVIA distinguishes between major market independent broadcast stations and network affiliates in smaller markets. App. 23a-24a. In any event, the passage relied upon by the Court of Appeals states merely that "Congress was under no illusion that there would be a complete disappearance of broadcast television nationwide in the absence of must-carry" because it understood that cable systems would continue to carry the most popular broadcasters. *Turner II*, 520 U.S. at 191. This observation came directly on the heels of this Court's recognition that Congress acted because "increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the incentive and the ability to delete, reposition, or decline carriage to local broadcasters in an attempt to favor affiliated cable programmers." *Id.*

Thus, it is clear that *Turner* permitted cable must-carry's invasion of First Amendment interests only because that measure protected the broadcast medium as a whole from a substantial defect in the market for cable carriage, not because it protected a particular subset of broadcasters from the natural operation of a properly functioning, genuinely competitive market for ideas. Whereas cable must-carry was designed to protect *all* local broadcast stations from *unfair* competition for cable carriage by monopoly operators, Congress designed SHVIA to protect only *independent* local broadcasters from *fair* competition for satellite carriage with popular, typically network-affiliated broadcasters.

III. THE COURT BELOW REFUSED TO APPLY THE STANDARD ANNOUNCED IN *TURNER II*, AND FUNDAMENTALLY REWORKED THIS COURT'S INTERMEDIATE SCRUTINY JURISPRUDENCE.

The Court of Appeals' intermediate scrutiny analysis rests upon a wholly unprecedented, plainly erroneous rule of law: according to the court, a law restricting speech will survive intermediate scrutiny so long as the government has substantial evidence that *another* statute imposing a similar speech restriction on a *different* medium advances an important interest. Such a showing is sufficient, the Fourth Circuit held, even though the government has *no* evidence (much less substantial evidence) that the speech restriction at issue advances its interest.

Both *Turner* decisions emphasized that a forced-carriage requirement can advance the interest of "preserving" a multiplicity of broadcast outlets only if it can be shown that, absent the requirement, non-carried stations would "deteriorate to a substantial degree or fail altogether." *Turner I*, 512 U.S. at 666; *Turner II*, 520 U.S. at 208. There is no real dispute that the government cannot meet that standard in this case – it has no evidence that even a single broadcast station (much less the "significant numbers" this Court required in *Turner I*, 512 U.S. at 666, and *Turner II*, 520 U.S. at 195), would substantially deteriorate or fail absent the carry-one, carry-all restriction on satellite carriers.[8] Implicitly acknowledging

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[8] The Court of Appeals did quote the Conference Committee's assertion that broadcast stations not carried by satellite "would face the same loss of viewership Congress previously found with respect to cable noncarriage." App. 42a (quoting Conference Report at 101). The statement, however, is absurd on its face, given that cable has 67 percent of the market while satellite only has 15 percent. The court read this assertion to suggest merely that such stations "would suffer some degree of harm in the absence of the carry one, carry all rule." *Id.* at 44a. In any case, to the extent the quoted statement could be read to suggest that SHVIA's forced-carriage regime is necessary to prevent substantial deterioration or failure of significant numbers

this reality, the court below simply refused to apply "*Turner II*'s substantial deterioration standard," holding that it "does not work here." App. 45a.

Specifically, the panel held that even though this Court required Congress to satisfy the "substantial deterioration" standard when it legislated to redress "the unitary threat" posed by the cable industry, Congress did not have to meet this Court's standard when it passed SHVIA, but instead "properly considered the effects of satellite *and cable* together in deciding to protect over-the-air viewers from any significant reduction in their viewing options." App. 45a-46a (emphasis added). The panel thus effectively imputed to the *satellite* industry the anticompetitive traits of the *cable* industry, concluding that the two different mediums constitute "a common threat" to over-the-air viewers. *Id.* at 48a.[9] In essence, the Fourth Circuit held that SHVIA survives intermediate scrutiny even though Congress had *no* evidence that *SHVIA itself actually advances* the governmental interest of preserving a multiplicity of local broadcast stations.

This holding eviscerates the essential elements of intermediate scrutiny analysis – namely, that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512

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of over-the-air stations, it is utterly devoid of any evidentiary support.

[9] The court briefly attempted to justify the carry-one, carry-all restriction as advancing a second interest, protecting "competition in local markets for broadcast television advertising." App. 35a. However, there is no mention of this purported interest in the statute, committee reports, or floor debates; it was advanced for the first time in the FCC's brief in the Court of Appeals. It is settled that speech cannot be burdened in order to advance "conjectural" interests conjured up as part of the government's litigation strategy, for "[s]tatements from the government's brief are not conclusive as to the objects of the statute . . . as we are concerned with the objectives of Congress, not those of" the government's lawyers. *Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 2063 (2001).

U.S. at 664 (plurality opinion). This Court has always insisted that a challenged restriction on speech must *itself* "advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (internal quotation omitted). The government must establish a causal link between the challenged legislation and the advancement of the claimed governmental interest. "This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Id.* (internal quotation omitted). Here, the Court of Appeals simply exempted the government from its obligation to demonstrate that the speech restriction in *this statute*, regulating the speech of the *satellite* industry, would in any material way advance its interest.

The First Amendment does not permit Congress to burden speech in such an overbroad manner. In *Turner II*, this Court considered whether the Cable Act's forced-carriage rule was overbroad because it applied even to individual cable operators lacking anticompetitive motives to deny carriage to broadcasters and to broadcasters that would survive non-carriage. 520 U.S. at 216. The Court was "not persuaded that either possibility is so prevalent that must-carry is substantially overbroad," for it found that "cable systems serving 70 percent of [cable] subscribers are vertically integrated with cable programmers, so anticompetitive motives may be implicated in a majority of systems' decisions not to carry broadcasters." *Id.* at 216-17. This analysis clearly suggests that the broad-brush application of a forced-carriage rule might very easily be overbroad *even within the same medium;* Congress surely cannot impose a new and substantively different forced-carriage restriction on a completely different medium unless that new restriction could be independently shown to actually advance an important governmental interest. *See generally Lorillard Tobacco*, 121 S. Ct. at 2428 ("A regulation cannot be sustained if *it* provides only ineffective or remote support for the government's purpose, or if there

is little chance that *the restriction* will advance the State's goal . . . . ") (internal citation omitted) (emphases added).

The holding below also flouts the settled requirement that a restriction on speech must " 'promote[ ] a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (citation omitted). A restriction on speech "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (applying intermediate scrutiny). Because no broadcast stations face substantial deterioration or failure absent the carry-one, carry-all restriction on editorial discretion, the interest in promoting multiplicity will not "be achieved less effectively absent the restriction," and satellite carriers' editorial choices are not "the exact source of the 'evil' " of diminished multiplicity.

The Court of Appeals attempted to justify examination of the combined effect of cable and satellite carriage of broadcast stations with a hypothetical scenario in which "five different television delivery mediums each served 15 percent of television households, together serving 75 percent of those households." App. 46a. If the government were required to justify its forced-carriage rule separately with respect to each medium, the court observed, it could not show that forced carriage was required to prevent substantial deterioration or failure of local broadcast stations even though collectively the five mediums produced that result. *Id.* But in the panel's hypothetical, the government's asserted interest in promoting multiplicity *is* advanced by imposing it on all five mediums for they cannot be distinguished from one another. In contrast, in this case, it is not: under the holding in *Turner II*, cable must-carry is both necessary and sufficient to promote multiplicity, while the carry-one, carry-all restriction is neither necessary nor sufficient to prevent "substantial deterioration or failure" of any broadcast stations.

Moreover, the Fourth Circuit's reasoning only underscores the untenable nature of the "multiplicity" rationale. A moment's reflection demonstrates that the fully functioning

marketplace described by the court's hypothetical *must*, in fact, be immune from a forced-carriage rule, or else the First Amendment has indeed disintegrated. For if Congress can group together a number of market participants who separately each control only a marginal segment of a commercial marketplace of ideas, but who when viewed together control a majority, and can use that "majority control" to justify usurping the editorial discretion of all of those speakers in order to promote an even greater "multiplicity" of voices, then it must be the case that Congress can impose a forced carriage rule on *every speaker* in *every marketplace*. Whether looking at bookstore owners, book publishers, newspapers, or movie houses, it will *always* be possible to group together a set of speakers who control 75 percent or more of the market. It will also *always* be possible to find that these "winners" in the marketplace of ideas constitute a "joint threat" to the viability of other voices, whose unpopularity may even lead to their extinction. Accordingly, if the Court of Appeals is right, Congress can always protect the losers in the marketplace of ideas by requiring the winners to "carry" the speech.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari be granted.

March 7, 2002

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION,
Petitioner,

No. 01-1151

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents,
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING; NATIONAL ASSOCIATION OF BROADCASTERS; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED,
Intervenors.

ECHOSTAR SATELLITE CORPORATION,
Petitioner,

No. 01-1271

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents,

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING; NATIONAL ASSOCIATION OF BROADCASTERS; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED,
Intervenors.

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

PAXSON COMMUNICATIONS CORPORATION,
Intervenor,

No. 01-1272

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents,

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED,
Intervenors.

On Petitions for Review of an Order of the
Federal Communications Commission.
(00-96, 99-363)

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION; COMMUNICATIONS CORPORATION; DISH, LIMITED, d/b/a DISH Network; DIRECTV ENTERPRISES, INCORPORATED; DIRECTV OPERATIONS, INCORPORATED; DIRECTV, INCORPORATED,

Plaintiffs-Appellants,

v.

No. 01-1818

FEDERAL COMMUNICATIONS COMMISSION; WILLIAM E. KENNARD, Chariman; SUSAN NESS, Commissioner, in her official capacity; HAROLD FURCHTGOTT-ROTH; MICHAEL K. POWELL, Commissioner, in his official capacity; GLORIA TRISTANI, Commissioner, in her official capacity; UNITED STATES COPYRIGHT OFFICE; LIBRARY OF CONGRESS; JAMES H. BILLINGTON, Librarian of Congress; MARY PETERS, Register of Copyrights, in her official capacity; UNITED STATES OF AMERICA,

Defendants-Appellees,

NATIONAL ASSOCIATION OF BROADCASTERS; THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INCORPORATED; THE UNIVISION NETWORK LIMITED PARTNERSHIP AND UNIVISION TELEVISION STATIONS, INCORPORATED; ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING,
Intervenors/Defendants-Appellees.

PEGASUS COMMUNICATIONS CORPORATION; CHANNEL MASTER LLC,
Parties in Interest.

CONSUMER FEDERATON OF AMERICA; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED,
Amici Curiae.

NATIONAL CABLE SATELLITE CORPORATION (C-SPAN); SPACE SYSTEMS/LORAL, INCORPORATED; PAXSON COMMUNICATIONS CORPORATION; NATIONAL ALLIANCE FOR MEDIA ARTS & CULTURE; ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS; VIRGINIA CITIZENS CONSUMER COUNCIL; CONEXANT SYSTEMS, INCORPORATED; BROADCOM CORPORATION,
Movants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(CA-00-1571-A)

Argued: September 25, 2001

Decided: December 7, 2001

Before WIDENER, NIEMEYER, and MICHAEL, Circuit Judges.

Petitions for review denied and judgment affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Widener and Judge Niemeyer joined.

COUNSEL

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OPINION

MICHAEL, Circuit Judge:

Direct broadcast satellite (DBS) service has recently joined cable and broadcast television as a major force in

the market for delivering television programming to consumers. In these consolidated cases, representatives of the satellite industry raise various constitutional challenges to Congress's efforts to regulate competition in that market through the Satellite Home Viewer Improvement Act of 1999 (SHVIA). Pub. L. No. 106-113, 113 Stat. 1501A-523. In addition, petitioners from the broadcast industry argue that one provision (the "a la carte rule") of the FCC's order implementing SHVIA must be struck down as an unreasonable interpretation of the statute.[1] By enacting SHVIA, Congress sought to promote competition between the satellite and cable industries by creating a statutory copyright license that allows satellite carriers to carry the signals of local broadcast television stations without obtaining authorization from the holders of copyrights in the individual programs aired by those stations. The Act also imposes a "carry one, carry all" rule, which was designed to "preserve free television for those not served by satellite or cable and to promote widespread dissemination of information from a multiplicity of sources." H.R. Conf. Rep. No. 106-464, at 101 (1999) (SHVIA Conference Report). The rule, which is

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[1] The parties in these cases fall into three groups, according to their interests regarding SHVIA: satellite industry representatives (or the "satellite carriers"), including the Satellite Broadcasting and Communications Association (SBCA), DirecTV, Inc., EchoStar Communications Corp., and Dish, Ltd., a wholly owned subsidiary of EchoStar doing business as DISH Network; broadcast representatives (or the "broadcasters"), including the National Association of Broadcasters (NAB), Paxson Communications Corp., and the Public Broadcasting Service (PBS); and the United States, essentially the Federal Communications Commission (FCC).

scheduled to take effect on January 1, 2002, will require satellite carriers that choose to take advantage of the statutory copyright license by carrying one broadcast station in a local market to carry all requesting stations within that market. We hold, as did the district court, that the carry one, carry all rule does not violate either the First Amendment or the other constitutional provisions cited by the satellite carriers. We also hold that the FCC's a la carte rule, which allows satellite carriers to offer local broadcast stations to their subscribers either individually or as part of a single package, is not arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706(2)(A).

I.

A.

Nearly all consumers receive their television programming through one of three delivery systems: broadcast television, cable, or satellite. Broadcast television stations transmit electromagnetic signals over the air, and these signals can be captured by any receiving television antenna within range. Twenty percent of American television households rely exclusively on broadcast stations for their television programming. Viewers pay no fee to receive broadcast signals. Instead, broadcast stations are supported by advertisers who pay for air time at rates determined by the audience sizes for particular programs. The most popular broadcast stations are affiliated with one of the four major television networks (ABC, CBS, NBC, and Fox). The major network affiliates compete for viewers and advertisers with various independent broadcasters, including independent commercial

stations, noncommercial stations, and affiliates of emerging networks (UPN, WB, and PAX).[2]

The broadcasters' principal competitors in the television programming delivery market are the cable and satellite industries. Cable and satellite companies now serve around 80 percent of America's television households. Unlike broadcasters, their primary source of revenue is subscription fees. Cable television distributes its signals to subscribers over a local network of wires. It has for many years been the leading provider of television programming to American homes. Roughly 67 percent of television households currently subscribe to cable. Although cable subscribers must pay for the right to receive cable signals, they receive better picture quality and a wider variety of programming options than do television viewers who rely on antennas. Today, 84 percent of cable systems offer their subscribers at least 30 channels, including national non-broadcast channels (such as ESPN, MTV, CNN, and The Weather Channel) and regional non-broadcast channels (such as the New England Sports Channel). Cable operators also retransmit the signals of local broadcast stations to their subscribers.

Providers of DBS (direct broadcast satellite) service deliver television programming by uplinking signals to satellites orbiting in space and then beaming those signals to receiving dishes connected to subscribers' television sets. In the 1980s satellite dishes were 6 to 10 feet in

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[2] For ease of reference, we will often describe the class of broadcast stations that includes commercial independents, noncommercial stations, and emerging network affiliates as "independent" broadcast stations.

diameter, and satellite carriers primarily served customers in rural areas. During the 1990s satellite carriers such as EchoStar and DirecTV developed much smaller dishes and began to compete with cable for subscribers in urban and suburban areas. Today, satellite carriers provide service in each of the nation's 210 television markets and serve about 13 percent of television households.[3]

Whereas cable systems deliver their signals to subscribers over local wire networks, satellite is primarily a national service. The satellites currently used by DBS providers occupy one of three positions in the Earth's orbit (called full CONUS slots) that allow the satellites to transmit a single beam covering the entire continental United States. The beam from a full CONUS satellite contains multiple frequencies, and compression technology enables multiple television channels to be carried on each frequency. The FCC licenses the use of 32 frequencies at each orbital slot; thus, there are 96 total frequencies that satellite carriers can use to reach satellite subscribers across the United States. Currently, 50 of these frequencies are licensed to EchoStar and 46 to DirecTV. Using their current compression ratios, EchoStar and DirecTV each have the ability to carry between 450

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[3] Our figures about the market shares of broadcast television, cable, and satellite are drawn from *In the Matter of: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, CS Docket No. 00-132, 2001 WL 12938 (2001) (FCC Seventh Annual Report). The figures reflect industry data through June 2000. *See id.* at 106. The broadcasters contend that satellite service has grown significantly since June 2000 and that satellite market share now exceeds 15 percent of television households.

and 500 channels via full CONUS satellites. Every channel carried on these satellites is beamed to the homes of all subscribers; however, channels that individual subscribers do not pay to receive are blocked by the use of software in the subscriber's home satellite equipment.

Like cable, satellite service is financed by subscription fees, and it offers better picture quality and more viewing options than broadcast television. Satellite carriers can provide their customers with more national and regional non-broadcast channels than most cable systems; yet before SHVIA was passed, satellite carriers had difficulty competing with cable for urban and suburban customers. The root cause of this difficulty was plain. Cable systems, but not satellite carriers, provided their customers with access to the signals of local broadcast stations. This competitive advantage was rooted not only in technology but also in federal copyright law. Unlike satellite carriers, cable operators have never been required to obtain copyright clearances for the broadcast programming they retransmit to their subscribers. To explain the origins of cable's competitive advantage over satellite, we must briefly review the history that produced the current legal regime governing the relationships among cable, broadcast television, and satellite.

In 1965, long before cable became a major force in the television programming delivery market, the FCC imposed "must-carry" rules on cable systems requiring them to retransmit the signal of any requesting broadcast station that was "significantly viewed" in its local market. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985) (discussing the early history of

cable regulation). The FCC feared that cable might undermine free, local broadcasting unless "local broadcasters were assured access to the whole of their allocated audience." *Id.* at 1441. Specifically, the must-carry rules were designed to aid newer UHF stations, which lacked the signal quality enjoyed by more established VHF stations. The FCC was concerned that in the absence of carriage obligations cable systems would carry only VHF stations and that non-carried UHF stations would be placed at a competitive disadvantage in the race for advertising dollars. *See id.*

Copyright law had little effect on cable until Congress passed the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, which provides that owners of copyrights in audiovisual works such as television programs have the exclusive right to authorize public performances of those works. 17 U.S.C. § 106(4). Although the Copyright Act of 1909 had granted copyright holders a similar right to control public performances of copyrighted works, cable operators' secondary transmissions of broadcast programs were not regarded as additional performances of those programs under the 1909 Act and thus did not infringe upon the intellectual property rights of the program copyright holders. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968). The 1976 Act's legislative history reveals that Congress intended to countermand the result in *Fortnightly* by designating cable's secondary transmissions of broadcast programs as public performances of those programs: "a cable television system is performing when it retransmits the broadcast [of a television program] to its subscribers." H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976

U.S.C.C.A.N. 5659, 5677. As a result, copyright law now generally requires parties seeking to retransmit the signal of a broadcast television station to obtain authorization from those holding copyrights in each of the programs broadcast by that station. Cable operators, however, have never been subject to this general rule. Congress found "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." *Id.* at 89, 1976 U.S.C.C.A.N. at 5704. As a result, the 1976 Copyright Act granted cable operators a statutory license that allows them to retransmit broadcast television signals without securing authorization from program copyright holders. *See* 17 U.S.C. § 111(c).

As cable grew in popularity, cable operators and cable programmers began to chafe at the FCC's must-carry rules. Eventually, cable interests challenged the rules as an unconstitutional burden on freedom of speech, and the rules were struck down by the D.C. Circuit in 1985. *See Quincy Cable TV*, 768 F.2d at 1463. The FCC moved quickly to adopt a modified set of carriage rules, but the D.C. Circuit again decided that the rules violated the First Amendment. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 293 (D.C. Cir. 1987). After a period of several years during which cable enjoyed the benefits of a statutory copyright license without the burdens of carriage obligations, Congress reimposed must-carry rules by passing the Cable Television and Consumer Protection and Competition Act of 1992 (Cable Act). Pub. L. No. 102-385, 106 Stat. 1460. Like the FCC's original must-carry rules, the Cable Act's must-carry rules were designed to protect broadcast stations that

might be refused carriage in the absence of a must-carry requirement.

The Cable Act must-carry rules were also challenged on First Amendment grounds, but were ultimately upheld by the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). In *Turner I* the Supreme Court held that the must-carry rules were content-neutral restrictions on speech, *Turner I*, 512 U.S. at 662, reviewable under the intermediate First Amendment scrutiny standards established by *United States v. O'Brien*. 391 U.S. 367 (1968). The Court further recognized that the interests served by the must-carry rules – preserving local broadcast television, promoting the "widespread dissemination of information from a multiplicity of sources," and promoting fair competition in the television programming market – were important "in the abstract." *Turner I*, 512 U.S. at 662-63. However, the Court remanded the case for further factual development on the question of whether these interests were genuinely advanced by the must-carry rules and whether the rules were a narrowly tailored means of promoting these interests. After the remand the Court held in *Turner II* that the cable must-carry rules fully satisfied the *O'Brien* test. As a result, cable operators today enjoy the privileges of a statutory copyright license but are also bound by carriage obligations.

As the above history indicates, the cable industry developed within a context of extensive FCC regulations, but it has been largely unaffected by copyright considerations. Before 1976, cable retransmissions of broadcast programs were not regarded as additional performances

of these programs and therefore did not infringe program copyrights. Since 1976, cable has enjoyed a statutory copyright license. In contrast, the satellite industry has until recently enjoyed relative freedom from FCC oversight, but its history has been shaped by a series of changes in federal copyright law. When the 1976 Copyright Act was passed, home satellite service did not exist, and the statutory copyright license created by 17 U.S.C. § 111(c) was granted only to cable systems. Although early satellite carriers lacked the channel capacity to retransmit the signals of local broadcast stations to the local audiences of those stations (called "local-into-local" service), the carriers did have the capacity and the desire to offer their subscribers some distant network signals. In other words, they had enough capacity to carry the signals of network affiliates in a major city (usually New York) throughout the entire country, but not enough capacity to carry local network affiliates in smaller cities. It was unclear, however, whether satellite carriers' secondary transmissions of the signals of network affiliates infringed the copyrights in the various programs broadcast by those stations. Satellite carriers argued that they might be eligible to use the § 111 copyright license as "cable systems," 17 U.S.C. § 111(c), or that their secondary transmissions of broadcast signals were noninfringing under the exemption for passive carriers in 17 U.S.C. § 111(a)(3). Still, they asked Congress to resolve the uncertainties about their copyright liability by passing new legislation.

Congress responded with the Satellite Home Viewer Act of 1988. Pub. L. No. 100-667, 102 Stat. 3949. Recognizing that the high transaction costs involved in clearing

the rights to network signals might impede the growth of the fledgling satellite industry, Congress gave carriers a limited copyright license to retransmit the signals of distant network broadcast stations to unserved households that were unable to receive an adequate over-the-air signal through a conventional rooftop antenna. 17 U.S.C. § 119(a)(2)(B) (1994), *amended by* § 119(a)(2)(B) (Supp. V 1999). "Unserved households" were defined in part as those located outside a station's "Grade B contour," as defined by FCC regulations. *Id.* § 119(d)(10) (1994), *amended by* § 119(d)(10) (Supp. V 1999). Congress limited the copyright license to retransmissions to unserved households in order to respect the terms of network-affiliate contracts, which grant local affiliates the exclusive right to broadcast their networks' programming in their local markets. Congress reasoned that local affiliates would lose the benefits of their bargained-for exclusivity rights if satellite carriers were allowed to import distant network signals into the affiliates' local markets. The limited license created by the 1988 Act spurred the growth of satellite carriers and expanded the viewing options of unserved households, though it did little to help satellite effectively compete with cable in urban and suburban areas where viewers could already receive high quality broadcast signals.

In the late 1990s two problems led Congress to revisit its work in the Satellite Home Viewer Act of 1988. First, cable continued to enjoy a virtual monopoly in subscription television services in metropolitan areas, and as a result cable subscribers were paying too much for those services. *See* S. Rep. No. 106-51, at 1-2 (1999). Second, the 1988 Act failed to deal adequately with the problems of

satellite subscribers who lived within the Grade B contours of network television stations. Although these subscribers were ineligible to receive distant network signals under the 1988 Act's limited copyright licence, many of them were unable to receive satisfactory over-the-air signals from their local network affiliates and thus remained without any meaningful access to network programming. *See id.* at 3-6. In addition, administrative difficulties in deciding which households were genuinely unserved led to increasingly bitter disputes between satellite carriers and broadcasters, leaving bewildered, angry consumers stuck in the middle. *See, e.g., ABC, Inc. v. PrimeTime 24*, 17 F.Supp.2d 478 (M.D.N.C. 1998), *aff'd*, 184 F.3d 348 (4th Cir. 1999).

Progress in satellite technology seemed to hold out a solution to both of these problems. Satellite carriers had developed the channel capacity to offer local-into-local service to their subscribers in some markets. Congress recognized that satellite carriers that could offer viewers access to their local broadcast stations could compete effectively with cable and drive down the price of subscription television services. *See* H.R. Rep. No. 106-79, pt. 1, at 14 (1999). In addition, Congress understood that the difficulties in deciding which households were sufficiently unserved to receive distant network signals would be irrelevant if satellite subscribers could watch their local network affiliates. *See id.*

In 1997 and 1998 Congress conducted extensive hearings on the possibility of extending the satellite carriers' statutory copyright license to include local-into-local

retransmissions. Representatives from the various industries had ample opportunities to state their views. Satellite industry representatives argued that without a statutory copyright license, the high transaction costs of obtaining the rights to retransmit broadcast programs would effectively prevent satellite carriers from offering local-into-local service. The satellite representatives further explained that their inability to carry local broadcast stations placed them at a competitive disadvantage to cable because viewers want to be able to receive all of the televisions channels they watch from a single source: "most people who walk into a satellite dealer's showroom turn around and walk out because they can't get their local TV channels through DBS." *Reauthorization of the Satellite Home Viewer Act: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce*, 106th Cong. 73 (1999) (1999 House Hearing) (statement of David Moskowitz, an EchoStar executive). The cable representatives stressed the need for regulatory parity, arguing that if satellite carriers were granted a statutory license comparable to that enjoyed by cable, they should also be subject to the must-carry rules and other regulatory constraints imposed on cable. *See The Copyright Office Report on Compulsory Licensing of Broadcast Signals: Hearing Before the Senate Committee on the Judiciary*, 105th Cong. 50 (1997) (statement of Decker Anstrom, President, National Cable Television Association). Finally, representatives of the broadcast industry emphasized that mandatory carriage rules were needed to ensure that satellite local-into-local service would not undermine Congress's interest in

preserving a vibrant system of free, local broadcast television. They explained that without carriage rules satellite carriers would choose to retransmit only the signals of major network affiliates in most markets and that competing stations in those markets would suffer from the loss of access to a significant (and growing) part of their potential audiences:

> No rational doubt may exist that a local station denied access to a portion of its inmarket audience is injured. Lack of carriage reduces potential audience and, therefore, actual audience. Reduced audiences translate to reduced revenue. Even where revenue reductions are less than fatal, they still affect a station's ability to provide the best practicable service to the public. At best, a local station which a satellite carrier refuses to carry would be placed at a demonstrable disadvantage vis-a-vis competing broadcast television stations which are carried.

Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearing Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong. 68 n.38 (1998) (1998 House Hearing) (statement of James J. Popham, Vice President and General Counsel, Association of Local Television Stations).

Congress sought to balance all of these concerns when it enacted SHVIA on November 29, 1999. The Conference Report explained that the legislation was designed to promote competition between satellite and cable while "preserv[ing] free television for those not served by satellite or cable systems." SHVIA Conf. Rep. at 101. Two interrelated provisions form the heart of

SHVIA. The first provision, codified at 17 U.S.C. § 122, amended the Copyright Act to create a statutory copyright license for satellite carriers similar to that enjoyed by cable operators. The license enables satellite carriers to make secondary transmissions of a broadcast station's signal into that station's local market without obtaining the authorization of those holding copyrights in the individual programs broadcast by that station. 17 U.S.C. § 122(a). Satellite carriers that make use of this license pay no royalties to program copyright holders. The second provision, codified at 47 U.S.C. § 338, amended the Communications Act of 1934 by creating mandatory carriage rules, including the carry one, carry all rule that is the focus of this litigation. 47 U.S.C. § 338(a)(1).

Since SHVIA's passage in late 1999 satellite carriers have enjoyed the benefits of the § 122 license without the burdens of the carry one, carry all rule. In order to phase in satellite carriage obligations, Congress decided that the rule would not become effective until January 1, 2002. *Id.* § 338(a)(3). As of that date the rule will require all satellite carriers who use the § 122 license to make local-into-local retransmissions in a local broadcast market to "carry upon request the signals of all television broadcast stations located within that local market." *Id.* § 338(a)(1). In other words, the voluntary decision to carry one local station in a market under the statutory copyright license will trigger an obligation to carry all the requesting stations in that market.[4]

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[4] The obligations imposed by the carry one, carry all rule are more limited than the name implies. Satellite carriers are not required to carry local commercial stations whose signals

Like the cable must-carry rules, SHVIA's carry one, carry all rule was designed to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services. SHVIA adopts much of the machinery of the cable rules. For example, broadcast stations may seek carriage from satellite carriers under either § 338's mandatory carriage requirements, 47 U.S.C. 325(b)(1)(C), or under the Act's retransmission consent provision, 47 U.S.C. 325(b)(1)(A), which allows broadcast stations to receive compensation from satellite carriers in exchange for permission to retransmit the broadcast stations' signals. In allowing broadcasters to choose between retransmission consent and mandatory carriage, both SHVIA's carry one, carry all rule and the cable must-carry rules recognize the practical realities of the television marketplace. Major network affiliates have bargaining power and will be carried voluntarily in most instances, so they will normally elect to proceed under the retransmission consent provision. *See Turner II*, 520 U.S. at 191, (explaining that the Cable Act's retransmission consent provision reflects the "popularity and strength of some broadcasters"). In contrast, independent stations (affiliates of emerging

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substantially duplicate those of another station in the same market. 47 U.S.C. § 338(c)(1). In addition, satellite carriers are not required to carry more than one affiliate of a given network in any local market unless the market contains two affiliates of the same network that are licensed to serve communities in different states. *Id.* Finally, Congress instructed the FCC to issue regulations limiting satellite carriers' obligations to carry multiple noncommercial broadcast stations in the same market. *Id.* § 338(c)(2).

networks, independent commercial stations, and noncommercial stations) may need the protection of must-carry rules and will normally elect mandatory carriage.

The primary difference between § 338 and the cable must-carry rules is that § 338's obligations are conditioned upon the satellite carrier's voluntary choice to make use of the § 122 license in a particular television market, but the cable must-carry rules are mandatory in all markets. This difference reflects the technological dissimilarities between cable and satellite. Cable systems are local, and nearly all have enough channel capacity to carry all the broadcast stations in their local market and still provide an attractive mix of national and regional non-broadcast programming. The satellite carriers, in contrast, currently beam the same 450 to 500 channels throughout the continental United States and thus could not comply with a rule requiring them to retransmit the signals of each of the country's roughly 1,600 local broadcast stations. *See* 1999 House Hearing at 95 (statement of David Moskowitz). While Congress recognized that satellite technology continues to improve and that eventually an unconditional must-carry rule might be possible, it still had to decide how to structure the satellite copyright license in the interim.[5]

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[5] Congress, for example, heard testimony from satellite executives outlining plans to develop spot beam satellites, which will have a much smaller footprint (geographic area where the satellite's beam is received) than the satellites currently orbiting in full CONUS slots. *See* H.R. Rep. No. 106-79, pt. 1, at 14 (1999); *Satellite/Cable Competition: An Examination of the EchoStar/MCI Deal. Hearing Before the Subcommittee on Antitrust, Business Rights, and Competition of the Senate Committee*

Although minor variations were possible, Congress had two basic options. It could have decided to give satellite carriers a station-by-station copyright license that could be used free of carriage obligations. Under such a license, satellite carriers could "cherry pick" the stations they wanted in each local market. Congress predicted that in practical terms a station-by-station license would result in satellite carriers using their available local-into-local capacity to carry only the major network affiliates in as many markets as possible, beginning with the largest markets and working toward the smaller ones. The other choice was to impose the carry one, carry all rule in order to create a market-by-market copyright license. This kind of license forces satellite carriers to expand their local-into-local service one market at a time, beginning with the carriage of all requesting local stations in the largest markets and expanding from there. In sum, Congress either could have allowed satellite carriers to cherry pick by retransmitting *some* stations (the major network affiliates) in *many* markets, or it could have allowed satellite carriers to retransmit *all* of the stations in *some* markets. While satellite carriers would have preferred (and now argue for) the first result, Congress chose the second because it feared that cherry picking of major

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on the Judiciary, 106th Cong. 40-41 (1999) (1999 Senate Hearing) (statement of Charles Ergen, CEO of EchoStar). These satellites will permit carriers to reuse their allotted spectrum frequencies in different geographic areas and will thereby increase the channel capacity carriers can use to offer local-into-local service. One reason why Congress decided to delay implementation of § 338 until January 1, 2002, was to give satellite carriers time to develop this new technology. *See* S. Rep. No. 106-51, at 14 (1999).

network affiliates within local markets would make it more difficult for non-carried stations in those markets to reach their audiences:

> Although the conferees expect that subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service, the Conference Committee is less sanguine that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations.

SHVIA Conf. Rep. at 102. Non-carried stations in cherry-picked markets would "face the same loss of viewership Congress previously found with respect to cable noncarriage." *Id.* at 101. Congress therefore concluded that the carry one, carry all rule would protect the ability of all local broadcasters to reach their audiences and thereby "preserve free television for those not served by satellite or cable systems and . . . promote widespread dissemination of information from a multiplicity of sources." *Id.*

B.

As directed by Congress, *see* 47 U.S.C. 338(g), the FCC issued a report and order implementing § 338's carriage requirements on November 29, 2000. *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues,* CS Docket Nos. 00-96 and 99-363 (2000) (SHVIA Order). The only aspect of the SHVIA Order at issue here is the a la carte rule adopted

in paragraph 99 of the order. The FCC concluded in that paragraph that § 338(d) does not require satellite carriers to sell all local television stations in a given market as one package. Instead, the Commission ruled that carriers could offer local stations "as a package or a la carte, at comparable rates." SHVIA Order at ¶ 99. This language would arguably permit satellite carriers to offer their subscribers a package including only the major network affiliates while offering independent broadcast stations only on an a la carte basis. However, in a subsequent order issued while these cases were under consideration, the FCC clarified its a la carte rule by stating that satellite carriers may not offer their subscribers a package including some subset of the local stations in a market (for example, the major network affiliates) while offering other local stations on an individual basis. *See In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Order on Reconsideration*, CS Docket No. 00-96, at ¶ 48 (2001) (Reconsideration Order). In other words, the Commission has now ruled that satellite carriers offering local-into-local service may offer their subscribers only two options: subscribers may buy the local stations of their choice a la carte at comparable prices, or they may buy a package of all the local stations for a price less than or equal to the cost of subscribing to all the stations individually (for example, 12 stations at one dollar each or all 12 for $12 or less). *See id.*

C.

The present SHVIA litigation began on September 20, 2000, when SBCA, DirecTV, EchoStar, and DISH Network

filed a complaint in the United States District Court for the Eastern District of Virginia alleging that SHVIA's carry one, carry all rule, 47 U.S.C. § 338(a)(1), exceeds Congress's power under the Copyright Clause and violates the First Amendment and the Due Process and Takings Clauses of the Fifth Amendment. NAB and PBS intervened on the side of the FCC in order to defend the statute. The satellite carriers moved for summary judgment, but the FCC and its supporting intervenors filed Rule 56(f) motions requesting discovery in order to respond to the satellite carriers' motion. The district court granted their motions, and discovery began. The FCC and its supporting intervenors then filed a Rule 12(b)(6) motion to dismiss and (ultimately) a cross-motion for summary judgment. After the parties had conducted extensive discovery in support of their summary judgment motions, the district court granted the FCC and its intervenors' motion to dismiss on June 19, 2001. *See Satellite Broad. & Communications Ass'n v. FCC*, 146 F.Supp.2d 803, 809 (E.D. Va. 2001). The district court treated the carry one, carry all rule as a content-neutral regulation of the satellite carriers' speech and upheld the rule under intermediate First Amendment scrutiny. In addition, the court rejected the satellite carriers' arguments alleging violations of the Copyright Clause and the Fifth Amendment. The satellite carriers appealed. That appeal has been consolidated with three petitions for review of the FCC's SHVIA Order. SBCA filed a petition for review of the SHVIA Order in this circuit, and EchoStar filed a similar petition in the Tenth Circuit. Both petitions advanced constitutional challenges to SHVIA similar to those advanced by the satellite carriers in the Eastern

District of Virginia. NAB filed a petition for review in the D.C. Circuit challenging the FCC's a la carte rule as arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Paxson Communications intervened in this last petition on the side of NAB. The three petitions for review were consolidated and assigned to this circuit pursuant to 28 U.S.C. § 2112(a)(3).

II.

A.

The parties devote the lion's share of their attention to the satellite carriers' First Amendment challenge to the carry one, carry all rule enacted in 47 U.S.C. § 338. Satellite carriers, like cable operators, function primarily as conduits for the speech of others. They transmit programming from a variety of sources (national and regional non-broadcast channels, superstations, and local broadcast stations) to their subscribers "on a continuous and unedited basis." *Turner I*, 512 U.S. at 629. Yet both satellite carriers and cable operators engage in speech protected by the First Amendment when they exercise editorial discretion over the menu of channels they offer to their subscribers. *See id.* at 636-37. Insofar as the carry one, carry all rule seeks to influence the exercise of that discretion, it is open to challenge under the First Amendment.

It is important to be clear at the outset, however, that some of the speech interests present in the *Turner* cases are absent here. The cable must-carry rules burdened the speech of cable programmers who had to be dropped from some cable systems in order to make room for local

broadcast stations. *See id.* at 675 (O'Connor, J., dissenting). To the extent the First Amendment guarantees viewers and listeners the right to receive information, *see Bd. of Educ. Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), that right was also burdened by the cable must-carry rules because the voices of dropped cable programmers were effectively lost to entire communities. Here, however, the satellite carriers do not claim that the carry one, carry all rule will force them to drop national or regional non-broadcast programmers in order to carry more local broadcasters. They claim only that they will have to carry independent broadcast stations in larger markets at the expense of major network affiliates in smaller markets. *See* Brief for Petitioners SBCA and EchoStar at 26-27, 35 n.13. While those major network affiliates would no doubt prefer to be carried on satellite services, the carry one, carry all rule does not deprive those affiliates of the ability to reach their audiences. In fact, they will be in exactly the same position under the carry one, carry all rule that they would have occupied if SHVIA had never been passed. Nor will any voices be completely lost to communities as a result of the carry one, carry all rule. The rule's only negative effect on viewers will be that the major network affiliates in some markets will be available to local viewers through only two mediums (broadcast and cable) rather than three. In sum, the carry one, carry all rule burdens speech only to the extent that it affects satellite carriers' decisions about how to allocate their capacity for offering local-into-local service by inducing them to carry

a different set of local broadcasters than the carriers would have preferred.

In considering the satellite carriers' First Amendment challenge, our first task is to determine the appropriate standard of review. *Turner I* provides the starting point. In that case the Supreme Court held that the cable must-carry rules were content-neutral restrictions on speech and were therefore not subject to strict scrutiny. *See Turner I*, 512 U.S. at 662. Here, the satellite carriers repeat many of the same arguments for strict scrutiny that were examined and rejected in *Turner I*. Although the satellite carriers labor mightily to distinguish that case, their effort ultimately fails.

The Supreme Court has said that the " 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.' " *Id.* at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This inquiry involves two steps. "First, we must examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates." *Chesapeake and Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996). If it does not, we then ask whether the regulation's " 'manifest purpose is to regulate speech because of the message it conveys.' " *Id.* (quoting *Turner I*, 512 U.S. at 645).

The text of § 338(a)(1) provides:

> [E]ach satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market.

47 U.S.C. § 338(a)(1). On its face, the rule confers benefits on a content-neutral basis because satellite carriers must carry *all* requesting local broadcast stations regardless of the content of their programming. *Cf. Turner I*, 512 U.S. at 645 ("The [must-carry] rules benefit all full power broadcasters who request carriage – be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular."). The satellite carriers argue, however, that the carry one, carry all rule is content-based on its face because its burdens are triggered by a satellite carrier's decision to transmit certain content, namely, the signal of a local television station.

We disagree. SHVIA's carriage obligations are not triggered *simply* by the decision to carry a local broadcast station in a given market. Instead, they are triggered by the decision to carry that station *by making use of the § 122 license*. A satellite carrier that privately negotiates the required copyright clearances can retransmit the signal of a local broadcast station without incurring any carriage obligations, but a carrier that retransmits the same signal by means of the statutory copyright license must comply with the carry one, carry all rule. Thus, the burdens of the

rule do not depend on a satellite carrier's choice of content, but on its decision to transmit that content by using one set of economic arrangements rather than another. Accordingly, we hold that the carry one, carry all rule is content neutral on its face.

Next, we must decide whether the carry one, carry all rule is content-based in its purpose. The satellite carriers claim that the rule has a content-based purpose because it seeks to promote the survival of independent broadcast stations, including affiliates of emerging networks, commercial independent stations, and public broadcasting stations. In support of this claim they cite language from the Conference Report indicating that Congress was concerned that satellite carriers would choose to carry only affiliates of the major networks and that other local broadcasters would be cut off from portions of their potential viewing audiences. *See* SHVIA Conf. Rep. at 102. In addition, the satellite carriers rely on legislative history suggesting that Congress sought to protect local broadcast stations because those stations provide valuable news and public affairs programming to their communities. *See id.* at 92.

Again, we conclude that these points do not distinguish the present case from *Turner I*. Both Congress and the Supreme Court understood perfectly well that the cable must-carry rules primarily benefitted independent broadcast stations. *See Turner I*, 512 U.S. at 672-73, (Stevens, J., concurring in part and concurring in the judgment); *Turner II*, 520 U.S. at 191-92. Similarly, the statutory findings included in the Cable Act described broadcast television as "an important source of local news and public affairs programming, and other local

broadcast services critical to an informed electorate," Cable Act § 2(a)(11), 106 Stat. at 1461, and stated that noncommercial television "provides educational and informational programming to the Nation's citizens," *id.* § 2(a)(8)(A), 106 Stat. at 1461. Nevertheless, the Court determined that neither must-carry's benefits to independent broadcast stations nor Congress's recognition of the distinctive value of local programming revealed a content-based purpose. Instead, the Court concluded, "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646. According to the Court, Congress's findings did not show a content-based preference for broadcast television over cable television; they merely indicated that local broadcast television was intrinsically valuable and therefore worth preserving. *Id.* at 648. In sum, *Turner I* held that the cable must-carry rules were content neutral in purpose even though the rules were meant to protect independent broadcast stations and even though Congress recognized that those stations provided valuable local programming. Here, the satellite carriers do no more than point to legislative history indicating that Congress had the same purpose in enacting SHVIA and that Congress continued to appreciate the distinctive value of local broadcast programming. This is not enough to establish that SHVIA has a content-based purpose.

We conclude, then, that the carry one, carry all rule should not be subject to strict scrutiny. At most, it is a content-neutral measure that imposes incidental burdens on speech and is therefore subject to intermediate First Amendment scrutiny under *United States v. O'Brien*,

391 U.S. 367 (1968). Because, as we explain below, the carry one, carry all rule passes constitutional muster under *O'Brien*, we need not address the FCC and its intervenors' argument that the rule should be evaluated under a more lenient standard.[6]

B.

O'Brien directs us to uphold a content-neutral regulation of speech if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Deciding whether an interest is important or substantial and whether that interest is unrelated to the suppression of free expression is usually simple enough, but this is only the beginning of

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[6] The FCC and the broadcasters argue that because § 338's carriage obligations are triggered by a satellite carrier's voluntary decision to make use of the § 122 license, the carry one, carry all rule does not impose a *burden* on speech at all and should therefore be subject only to rational basis review. They point out that SHVIA grants satellite carriers a valuable benefit (the statutory copyright license) and places conditions on the use of that benefit, but does not deprive the carriers of any rights they possessed before SHVIA was enacted. Accordingly, the FCC and the broadcasters contend that SHVIA's statutory copyright license should be seen as a targeted government subsidy by analogy to *Rust v. Sullivan*, 500 U.S. 173 (1991), and similar cases. As noted above, we find it unnecessary to address this argument because we conclude that the carry one, carry all rule is consistent with the First Amendment even if it is treated as a content-neutral burden on satellite carriers' speech.

the inquiry. As the *Turner* cases explain, the *O'Brien* standard gets its bite from a two-part analysis. First, we must determine whether the regulation materially advances an important or substantial interest by redressing past harms or preventing future ones. These harms must be "real, not merely conjectural," and the regulation must "alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664. If a regulation places even incidental burdens on speech without yielding some genuine benefit, it must be struck down. In making these evaluations, we must "accord substantial deference to the predictive judgments of Congress." *Id.* at 666. Our "sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195 (internal quotation marks and citation omitted). If the regulation materially advances some important or substantial interest, we then proceed to the second part of the *O'Brien* analysis and ask whether the regulation is narrowly tailored to serve that interest. The *O'Brien* narrow tailoring requirement is less rigorous than that applied under strict scrutiny. The requirement is met "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks and citation omitted). In other words, the regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

In sum, the carry one, carry all rule satisfies the *O'Brien* standard if the rule materially advances at least one substantial government interest in a narrowly tailored manner. The satellite carriers claim that the rule is

simply a way to promote the interests of some speakers (independent broadcasters in large markets) at the expense of others (major network affiliates in small and medium-sized markets). Predictably, they contend that this interest is not even legitimate, let alone substantial or important. We agree that the carry one, carry all rule is meant to preserve the ability of independent broadcasters to reach their local audiences, but Congress did not view that goal as an end in itself. Instead, Congress recognized that protecting independent broadcasters from the harmful effects of satellite cherry picking would further two substantial government interests. The first is the government's interest in preserving a multiplicity of local broadcast outlets for over-the-air viewers, those who do not subscribe to satellite or cable service. The second is the government's interest in preventing its grant of a statutory copyright license to satellite carriers from undermining competition in local markets for broadcast television advertising. Though these two interests are closely related because both would be threatened in the same manner without the carry one, carry all rule, they are distinct because the first involves harms to over-the-air viewers while the second involves harms to local advertisers and to independent broadcasters themselves. As we explain next in the first part of our *O'Brien* analysis, we find that both interests are materially advanced by the carry one, carry all rule. We will now address each interest in turn.

1.

Congress enacted the carry one, carry all rule to "preserve free television for those not served by satellite

or cable systems and to promote widespread dissemination of information from a multiplicity of sources." SHVIA Conf. Rep. at 101. These interests are clearly substantial and unrelated to the suppression of free expression. *See Turner I*, 512 U.S. at 662-63 (stating that the government's interests in "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources" were both important and unrelated to the suppression of free expression). In deciding whether § 338 materially advances these two interests, it is useful to characterize them more precisely. We therefore adopt the characterization suggested in *Turner II*, where the Supreme Court treated the two interests as a unified whole: "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." *Turner II*, 520 U.S. at 194; *see also id.* at 193 (stating that Congress's interest in "preserving the existing structure of the broadcast industry discloses a purpose to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households" (internal quotation marks and citation omitted)); *id.* at 226 (Breyer, J., concurring in part) (describing the Cable Act's purpose as "provid[ing] over-the-air viewers who lack cable with a rich mix of over-the-air programming" and "assur[ing] the over-the-air public access to a multiplicity of information sources" (internal quotation marks and citation omitted)). In short, the government interests served by the carry one, carry all rule are best

characterized as a single interest in preserving a multiplicity of broadcast outlets for over-the-air viewers.

This characterization accurately captures the concerns expressed by Congress when it enacted § 338. In explaining that a market-by-market license promotes both the interest in preserving broadcast television for over-the-air viewers and the interest in promoting widespread dissemination of information from multiple sources, Congress expressed its concern that "absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage." SHVIA Conf. Rep. at 101. In other words, Congress understood that the threat to over-the-air viewers was not the loss of broadcasting as a medium, but the loss of the independent stations needed to provide those viewers with a rich mix of broadcast programming from multiple sources.

The proper question, then, is whether the government's interest in preserving a multiplicity of broadcast outlets for over-the-air viewers is materially advanced by the carry one, carry all rule. The satellite carriers appear to concede that the rule would effectively combat any real threat to this interest, but the carriers argue that they do not pose a real threat. Congress, however, concluded that satellite carriers would threaten this interest in the near future if it gave them a statutory copyright license without imposing carriage rules. *See* SHVIA Conf. Rep. at 101. Our review of that judgment has both factual and legal aspects. We must decide whether Congress's factual predictions about the consequences of enacting a station-by-

station copyright license were supported by substantial evidence in the legislative record. *See Turner II*, 520 U.S. at 195-96. We may also look to evidence outside the legislative record in order to confirm the reasonableness of Congress's predictions. *See id.* at 196, 204. In addition, we must determine whether the predicted set of consequences is legally sufficient to count as a real threat to the government's interest in preserving a multiplicity of broadcast outlets for over-the-air viewers.

Congress made extensive statutory findings in enacting the Cable Act. *See* Cable Act § 2(a), 106 Stat. at 1460-63. SHVIA's legislative record is less extensive, but this does not affect our duty to accord substantial deference to Congress's predictive judgments. "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666; *see also Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote."). We can fairly conclude from the legislative record that Congress made the following three factual predictions: (1) that satellite carriers would soon capture a significant part of the television programming delivery market, (2) that satellite carriers would continue to deny carriage to significant numbers of independent stations in markets where they chose to offer local-into-local service, and (3) that non-carried stations in those markets would be harmed by losing access to parts of their potential audiences. In sum, Congress predicted that if satellite carriers enjoyed a

statutory copyright license but were not bound by carriage rules, significant numbers of independent broadcast stations would be harmed by losing access to significant portions of their audiences. As we explain below, each of Congress's predictions was supported by substantial evidence. The harder question is the essentially legal one of whether the consequences Congress predicted constitute a real threat to the government's interest in preserving a multiplicity of local broadcast outlets for over-the-air viewers. We begin with the three factual predictions, addressing them one by one.

Congress's prediction that satellite carriers would become a significant force in the television programming delivery market was supported by substantial evidence. While Congress did not explicitly find that satellite carriers would attain any specific level of market penetration, it obviously projected that satellite carriers would attract enough viewers to put downward pressure on cable rates. Congress created the § 122 copyright license to produce this result, *see* SHVIA Conf. Rep. at 91-92; S. Rep. No. 106-51, at 1-3 (1999), and it cannot be unreasonable for Congress to proceed on the premise that its own legislation will be effective. Moreover, the rapid growth in satellite service since SHVIA's enactment suggests that Congress's prediction will soon come true. The number of DBS subscribers grew by 28 percent between June 1999 and June 2000. *See* FCC Seventh Annual Report at ¶ 61. In comparison, cable subscriptions grew at an annual rate of less than 1.5 percent. *See id.* at ¶ 65. DBS providers have attributed much of their growth to the § 122 license. *See id.* at ¶ 68; *see also id.* at ¶ 69 (stating that SBCA reported a 43 percent increase in the number of new DBS subscribers

per month in the 6 months following SHVIA's enactment). In its comments for the FCC's Seventh Annual Report, SBCA predicted that DBS service might have as many as 16 million subscribers (over 15 percent of American television households) by the end of 2000.[7] *See id.* at ¶ 65. In sum, Congress's first prediction was entirely reasonable.

Congress's second prediction was that without § 338, satellite carriers would refuse to carry significant numbers of independent broadcast stations in markets where they offered local-into-local service. *See* SHVIA Conf. Rep. at 101. This prediction was supported by substantial evidence in the record before Congress. *See, e.g.*, 1999 Senate Hearing at 10 (statement of Charles Ergen). In addition, the satellite industry's track record under SHVIA has proven the prediction to be accurate. As of November 5, 2001, DirecTV carried the four major network affiliates in 41 markets (a total of 164 stations), but carried a total of only 13 independent stations in those 41 markets. *See* www.skyreport.com/skyreport/local.htm. Similarly, EchoStar carried the four major network affiliates in 35 markets (a total of 140 stations), but carried only 13 independent stations in those markets. *See id.* Thus, during SHVIA's phase-in period the satellite carriers have confined their local-into-local offerings almost exclusively to major network affiliates. Moreover, they have plainly announced their intention to continue

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[7] As noted above, *see supra* note 3, the broadcasters contend that the market share of DBS providers now exceeds the 15 percent share forecast by SBCA in its comments for the FCC's Seventh Annual Report.

cherry picking the major network affiliates so long as they may lawfully do so. This preference for cherry picking will not simply wither away because it is rooted in the national character of existing satellite technology.

As we have said, satellite carriers currently beam the same signals throughout the nation from satellites orbiting in full CONUS slots. As a result, a carrier who chooses to retransmit the signal of an independent commercial station in Boston beams that station's signal to subscribers nationwide, but blocks out the signal at the homes of all subscribers who do not live in the Boston area. As this example illustrates, local-into-local service is a relatively inefficient use of a carrier's finite channel capacity. National programming uses that capacity more efficiently because it can be expected to draw more viewers across the country as a whole than any local channel, even if the national programming is less popular within individual local markets than the programming of the independent broadcast stations in those markets. As a result, satellite carriers have economic incentives to favor national non-broadcast programming over local broadcast programming. While improvements in satellite technology, such as the deployment of spot beam satellites, may reduce the inefficiencies that result from carrying local broadcast stations, these inefficiencies will continue to exist to some degree so long as the beams from individual satellites cover multiple television markets. Yet satellite carriers also recognize that their product is less attractive to subscribers if they fail to carry the local affiliates of major networks because most people watch these stations about "65 percent of the time" they spend watching television. 1999 Senate Hearing at 7 (statement

of Charles Ergen). Under these circumstances, the economically rational choice for satellite carriers is to cherry pick the major network affiliates in markets where the carriers offer local-into-local service. We conclude, then, that both the satellite industry's track record and its economic incentives provide substantial evidence supporting Congress's predictive judgment that satellite carriers will deny carriage to significant numbers of independent broadcast stations if the carriers are not bound by the carry one, carry all rule.

Congress's third prediction was that lack of satellite carriage would harm independent broadcast stations. *See* SHVIA Conf. Rep. at 101 (stating that "[n]on-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage"). This general prediction rested on the following series of more specific predictions about the consequences of non-carriage. First, a non-carried station will effectively lose access to satellite subscribers if satellite carriers cherry pick the major network affiliates in its market.[8] Second, a

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[8] A non-carried station in a cherry-picked market loses access to satellite subscribers in that market in the sense that those subscribers will be significantly less likely to watch that station than would be the case if the subscribers received either *all* or *none* of their local stations via satellite. This proposition rests on two plausible and widely shared empirical assumptions. The first assumption is that television viewers prefer to receive all of their programming from one source. For subscribing households, satellite becomes the primary source of television programming, and it follows that satellite subscribers will be less likely to watch non-carried broadcast stations even if they have antennas that can capture a clear signal from those stations. The second assumption is that satellite subscribers

station's loss of access to those subscribers will result in lower ratings, which will in turn lead to lower advertising revenues. Third, lower revenues will lead to a decrease in programming quality, which will then further depress ratings and station revenues, all in a vicious cycle. The record before Congress contains substantial evidence to support these predictions. *See ante* at 16 (statement of James J. Popham); *Copyright Compulsory License Improvement Act: Hearings on H.R. 768 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 106th Cong. 47 (1999) (statement of John Hutchinson, CEO, Local Television on Satellite) (stating that "[s]atellite could effectively, like cable, become the bottleneck which disenfranchises stations"). Further, the predictions are essentially the same as those Congress made in passing the Cable Act. *See Turner II*, 520 U.S. at 208-09 (discussing testimony from broadcasters that explained how cable non-carriage leads to declines in ratings, advertising revenues, and program quality). As the Supreme Court explained in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000), the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the

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who are able to receive local network signals via satellite will be unlikely to obtain or maintain antennas in order to receive independent local broadcast stations. *See* SHVIA Conf. Rep. at 102. In contrast, satellite subscribers who receive no network signals via satellite will probably use antennas or subscribe to basic cable in order to have access to network signals. This assumption explains why the carry one, carry all rule benefits independent broadcast stations even in markets where satellite carriers do not offer local-into-local service.

justification raised." Because the justifications here were both familiar and plausible, Congress could reasonably conclude, at the very least, that non-carried stations would suffer some degree of harm in the absence of the carry one, carry all rule. The extent of that harm would depend, of course, on how many potential viewers of non-carried stations became satellite subscribers.

So far, we have established that Congress had substantial evidence to support its overall prediction that in a world where satellite carriers enjoyed the benefits of a statutory copyright license without the burdens of the carry one, carry all rule, satellite carriers would become significant competitors to cable and would continue to cherry pick major network affiliates in markets where they offered local-into-local service. In that world, non-carried stations in cherry-picked markets would lose access to significant parts of their local audiences. Again, the harder question is whether this predicted set of consequences is enough to justify imposing the carry one, carry all rule on satellite carriers in order to protect the government's interest in preserving a multiplicity of broadcast outlets for over-the-air viewers. In other words, the question is whether preventing the consequences Congress predicted counts as addressing a real threat to that interest in a material way.

This is essentially a legal question, and the satellite carriers claim that it has a clear answer. Relying on *Turner II*, they argue that imposing carriage rules on a particular television programming delivery medium is justified only when stations not carried by that medium will "deteriorate to a substantial degree or fail altogether." *Turner II*, 520 U.S. at 208. It is only at this point, they claim, that

carriage denials affect the interests of over-the-air viewers. The satellite carriers contend that under *Turner II*'s substantial deterioration standard, the carry one, carry all rule does not address a real threat because Congress lacked substantial evidence to support the judgment that stations denied access to (at most) 15 percent of their audiences would substantially deteriorate. The carriers remind us that when Congress enacted the Cable Act in 1992, cable controlled 60 percent of the television programming delivery market. *See* Cable Act § 2(a)(3), 106 Stat. at 1460.

To the extent that the satellite carriers would have us decide this case by looking at the difference between the 13 to 15 percent market share of satellite carriers today and the 60 percent market share enjoyed by cable in 1992, they oversimplify the issues. For one thing, *Turner II* held only that Congress could reasonably conclude that a broadcast station's loss of access to 60 percent of its market was *sufficient* to cause that station to substantially deteriorate. It left open the possibility that Congress could reasonably conclude that some smaller level of audience loss would significantly harm non-carried stations. More fundamentally, however, we reject the satellite carriers' argument that substantial deterioration of non-carried broadcast stations is always the proper standard for deciding when carriage rules are justified. The substantial deterioration standard does not work here because that standard was formulated to address a situation where the market for subscription television services was dominated by a single medium.

When Congress passed the Cable Act of 1992, cable television was the sole threat to the government's interest

in preserving a multiplicity of broadcast outlets for over-the-air viewers. The substantial deterioration standard employed in *Turner II* assumes the existence of a unitary threat by insisting that the government show that denial of carriage on an individual medium would threaten the viability of independent broadcasters. *See Turner II*, 520 U.S. at 195. But the substantial deterioration standard was not meant to address situations in which the threat to broadcasters comes from competitors in multiple mediums, and it yields implausible results when applied outside its intended context. Suppose, for example, that five different television delivery mediums each served 15 percent of television households, together serving 75 percent of those households. If the standard applied in these circumstances, it would mean that Congress could not impose must-carry rules on any of the mediums because stations denied carriage on any one medium would lose access to only 15 percent of their audiences and therefore would not suffer substantial deterioration. That cannot be the law.

In enacting SHVIA, Congress properly considered the effects of satellite and cable together in deciding to protect over-the-air viewers from any significant reduction in their viewing options. Cable and satellite together currently serve around 80 percent of America's television households, with cable accounting for about 65 percent and satellite about 15 percent. We have already explained that both services pose the same kind of threat to broadcast stations because both – by making selective carriage decisions – threaten to cut off independent broadcast stations from parts of their audiences. Together, cable and

satellite would pose an overwhelming threat to independent broadcasters if neither were bound by carriage rules. Congress evidently reasoned that with increasing competition from satellite carriers, the threat to independent broadcasters posed by cable would become a threat jointly posed by cable and satellite. It therefore concluded that it could regulate both contributors to that common threat: "The [Conference Committee] expect[s] that, by January 1, 2002, satellite carriers' market share will have increased and that the Congress'[s] interest in maintaining free over-the-air television will be undermined if local broadcasters are prevented from reaching their viewers *by either cable or satellite distribution systems.*" SHVIA Conf. Rep. at 101 (emphasis added).

The satellite carriers contend that the carry one, carry all rule needlessly restricts their speech because it is not necessary to protect the interests of over-the-air viewers. Again, they claim that those interests are not threatened because broadcasters denied satellite carriage will not lose access to enough of their audiences to suffer substantial deterioration. But if over-the-air viewers are currently safe, that only reflects the fact that cable is *already* bound by must-carry rules. In other words, the satellite carriers' arguments boil down to the claim that even if both cable and satellite jointly contribute to a common threat to the government's interest in protecting a multiplicity of broadcast outlets for over-the-air viewers, Congress may not impose carriage rules on satellite carriers because their contribution to that common threat is smaller and because cable is already regulated. The First Amendment does not require this result. It is more sensible to allow Congress the latitude to view the regulatory landscape as

a whole by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects. Where multiple competitors jointly pose a common threat with a common structure, the First Amendment permits Congress to protect important government interests from that threat by imposing reasonable content-neutral restrictions on every competitor who significantly contributes to that threat.

Under this standard, Congress's factual predictions easily justify the imposition of the carry one, carry all rule. Even if it is debatable whether satellite's *current* market share is sufficient to count as a significant contribution to the common threat posed by cable and satellite, Congress surely had a substantial basis for concluding that satellite would soon become a significant challenger to cable in the television programming delivery market. Accordingly, we hold that Congress reasonably concluded that the carry one, carry all rule addressed a real threat to the government's interest in preserving a multiplicity of broadcast outlets for over-the-air viewers. That interest therefore survives the first part of the *O'Brien* inquiry: it is substantial, and it is genuinely advanced by the carry one, carry all rule.

2.

The FCC argues that the carry one, carry all rule also materially advances a second substantial government interest: the interest in preventing SHVIA's grant of a statutory copyright license to satellite carriers from undermining competition in local markets for broadcast

television advertising. This interest is, as we have said, closely related to the interest in preserving a multiplicity of broadcast stations for over-the-air viewers. Both interests are threatened when independent broadcasters lose access to parts of their local audiences as a result of cherry picking by satellite carriers. But although cherry picking threatens both interests in the same way, the interests are nonetheless distinct. The first interest is ultimately an interest in protecting over-the-air television viewers. The second is an interest in protecting the broadcasters themselves, as well as the advertisers who benefit from vigorous competition among the broadcast stations in their local markets.

The satellite carriers attempt to portray the carry one, carry all rule as a self-conscious government attempt to manipulate a previously undistorted marketplace of ideas in order to prop up weak broadcast stations. This portrayal misrepresents the realities of the television market. When Congress considered SHVIA in 1999, that market was already pervasively shaped by government policies: FCC licensing of broadcasters, the cable must-carry rules, copyright law, and the statutory licenses enjoyed by cable and (to a lesser extent) satellite are only a few examples. Against that backdrop Congress explicitly sought ways to improve the competitive position of satellite in relation to cable because it believed that cable rates were too high. Nothing in the text of SHVIA or its legislative history indicates that Congress thought broadcasters enjoyed any unfair advantages in relation to satellite or cable. Recognizing that satellite carriers needed a statutory copyright license to be able to compete with cable, Congress then

considered the possible effects on independent broadcasters of the decision to grant that license.

As we have explained above, the choice was between offering satellite carriers a station-by-station license and a market-by-market license. Congress understood that allowing satellite carriers to offer local-into-local service by cherry picking network affiliates would deprive non-carried stations of access to significant (and growing) parts of their audiences. We have already discussed at length the possibility that cherry picking would ultimately harm over-the-air viewers by reducing the quality or quantity of broadcast outlets available for those viewers, but here we are concerned with the immediate effects of selective carriage on local television advertising markets. Local broadcasters and cable companies compete with one another in those markets, and their competitive positions are a function of their ratings. Independent stations that lost access to even a small part of their potential audiences would therefore be placed at a competitive disadvantage compared to carried stations in their efforts to attract local advertisers. *See* 1998 House Hearing at 68 n.38 (statement of James J. Popham). Congress heard testimony that a station-by-station license would essentially enable satellite carriers to pick winners and losers in local advertising markets, undermining the efforts of emerging television networks to compete with the established broadcast networks: "Nothing could more surely dull the cutting edge of competition from new networks, their local affiliates, and innovative independent stations in local markets." *Id.* at 59. In short, Congress had substantial evidence for the judgment that a station-by-station copyright license would have boosted

competition in one market (the market for subscription television services) by hampering competition in another market (the market for local broadcast advertising). Such a license would have harmed both independent broadcasters and local advertisers. By choosing a market-by-market license, Congress acted to minimize the unintended, disruptive effects of its intervention in the television marketplace.

This interest in preserving a level playing field in local broadcast advertising markets seems to us at least as significant as many interests which the Supreme Court has found to be important or substantial. *See, e.g., Clark v. Community for Creative Non Violence,* 468 U.S. 288, 296 (1984) (holding that government had a substantial interest in maintaining parks in Washington, D.C., in "an attractive and intact condition"); *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 807 (1984) (holding that city had a substantial interest in preventing "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property"). We therefore conclude that Congress's interest in minimizing the unintended adverse effects of its legislation on local broadcast advertising markets is substantial enough to justify incidental, content-neutral restrictions on speech. The carry one, carry all rule advances this interest in a material way because it preserves a level playing field on which local broadcasters can compete for advertising revenue by preventing satellite carriers from making selective carriage decisions within local television markets. Accordingly, we hold that this interest also satisfies the first part of the *O'Brien* analysis.

3.

We have identified two interests that pass scrutiny under the first part of the *O'Brien* analysis. The second part of the *O'Brien* analysis employed in *Turner II* requires us to ask whether the carry one, carry all rule is a narrowly tailored means of advancing these interests. The government has considerable latitude under this test. It may "employ the means of its choosing so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further that interest." *Turner II*, 520 U.S. at 213-14 (internal quotation marks and citation omitted). The parties have devoted relatively little attention to this aspect of the *O'Brien* analysis, and with good reason. Congress enacted the carry one, carry all rule to protect independent broadcast stations from the harm they would suffer if satellite carriers denied them carriage while retransmitting the signals of the major network affiliates in their markets. As we have explained, the rule genuinely advances two important interests: the interest in preserving a multiplicity of local broadcast outlets for those who do not subscribe to cable or satellite and the interest in minimizing the unintended effects of SHVIA's statutory copyright license on local broadcast advertising markets. The satellite carriers concede that without the carry one, carry all rule, they would have chosen to carry only major network affiliates in many local markets and would therefore have threatened independent broadcasters with the very harms that Congress sought to prevent. Accordingly, any legislation that created a statutory copyright license without imposing some

form of mandatory carriage requirement would have been significantly less effective – indeed, it would have been completely ineffective – in advancing the government's interests. That is sufficient to satisfy *O'Brien*'s narrow tailoring requirement. Further, the particular form of carriage requirement imposed by SHVIA is not an excessive burden on satellite carriers because it leaves them with the choice of when and where they will become subject to the carry one, carry all rule. As a result, we hold that the rule is a narrowly tailored means of promoting the government's important ends of preserving a vibrant mix of local broadcast outlets for over-the-air viewers and minimizing the unintended side effects of SHVIA's statutory copyright license on local broadcast advertising markets. The carry one, carry all rule is therefore consistent with the First Amendment.

C.

We have reserved for separate consideration the satellite carriers' argument that the carry one, carry all rule cannot be justified under the reasoning of the *Turner* cases because Congress had no evidence that the rule was needed to prevent anticompetitive behavior by satellite carriers. The satellite carriers claim that the cable must-carry rules were designed to prevent anticompetitive behavior by cable operators and that the Supreme Court upheld those rules only by virtue of their relationship to that goal.

The satellite carriers are correct that Congress was concerned about anticompetitive practices when it passed the Cable Act. Congress had substantial evidence that

cable operators had bottleneck monopoly power over their subscribers' access to television signals and that cable operators had substantial economic incentives to abuse that power by denying carriage to local broadcast stations even when those stations were more popular with cable subscribers than some of the cable channels that replaced them. Congress found that the cable industry competed with local broadcasters for advertising revenues and that cable therefore had incentives to reduce the attractiveness of broadcast stations to advertisers by refusing to carry those stations. *See* Cable Act § 2(a)(14)-(15), 106 Stat. at 1462. Congress also found that vertical integration in the cable industry (common ownership of cable systems and cable programming sources) gave cable operators reasons to favor cable programming over broadcast programming. *See id.* § 2(a)(5), 106 Stat. at 1460. Congress lacked similar evidence of anticompetitive behavior by satellite carriers. While satellite carriers also possess bottleneck power in the sense that they control the primary gateway through which television programming enters the homes of their subscribers, Congress had no evidence that satellite carriers would abuse that power by engaging in anticompetitive behavior. Unlike cable companies, satellite carriers do not compete with local broadcasters for advertising and they are not vertically integrated with non-broadcast programming sources to any significant degree.

The satellite carriers argue that without evidence of unfair competition by satellite carriers, the carry one, carry all rule must be struck down. The argument cannot be summarily rejected, for it is not immediately clear whether or how the holdings in the *Turner* cases depend

on evidence of anticompetitive practices in the cable industry. *Compare Turner I*, 512 at 661 (stating that the must-carry rules are "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television") *with Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part) (providing the fifth vote to uphold the must-carry rules without relying on the claim that the rules "sensibly compensate for some significant market defect"). As we read the *Turner* opinions, however, the theme of preserving broadcast television is more fundamental than the theme of preventing unfair competition: "Federal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation. . . . Congress has an *independent* interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." *Turner II*, 520 U.S. at 194 (emphasis added). This means that if satellite carriers threaten the government's interest in preserving a multiplicity of local broadcast outlets, it does not matter whether the threat can be traced to anticompetitive practices by those carriers. Our reading gains further support from the fact that in *Turner II* the Court discussed evidence of unfair competition primarily to establish that cable operators would in fact deny carriage to substantial numbers of broadcast stations without the must-carry rules. *See id.* at 197-208. In other words, the discussion of anticompetitive behavior in *Turner II* sought not to explain the nature of the

interest promoted by the must-carry rules, but to explain why the threat that cable posed to broadcast television and its viewers was real rather than conjectural.

Satellite carriers do not deny carriage to independent broadcasters for anticompetitive reasons. As we have explained, they do so because the national character of satellite delivery systems provides economic incentives to favor national, non-broadcast programming over local, broadcast programming. There is nothing anticompetitive about satellite carriers' efforts to make the most efficient use of their existing channel capacity. In contrast, Congress found that in the absence of must-carry, cable operators would likely deny carriage to many independent broadcast stations for anticompetitive reasons, such as the desire to undercut a competitor in the market for local advertising. The crucial point here, however, is that this difference between satellite carriers and cable operators does not change the analysis under the *Turner* cases in any fundamental way. Cherry picking major network affiliates in a local market threatens the non-carried broadcast stations in that market (and, ultimately, the viewers who depend on them) in the same ways, regardless of whether the motive behind the cherry picking is anticompetitive or not. Accordingly, we reject the satellite carriers' argument that the carry one, carry all rule could only be justified as a means to prevent anticompetitive behavior by satellite carriers.

D.

In conclusion, we hold that the carry one, carry all rule is a reasonable, content-neutral restriction on satellite carriers' speech. It satisfies the *O'Brien* standard because it is narrowly tailored to serve two substantial government interests: the interest in preserving a multiplicity of broadcast outlets for over-the-air viewers and the interest in preventing SHVIA's statutory copyright license from undermining competition in local broadcast advertising markets. The rule's relation to either interest is sufficient to render it consistent with the First Amendment.

III.

The satellite carriers devote limited attention to their remaining constitutional arguments. They contend that Congress exceeded its power under the Copyright Clause when it conditioned satellite carriers' rights to make use of SHVIA's statutory copyright license upon their compliance with the carry one, carry all rule. The carriers also argue that the rule constitutes an uncompensated taking of their property in violation of the Fifth Amendment. The district court correctly rejected both claims.[9]

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[9] The satellite carriers also raised a substantive due process claim against the carry one, carry all rule in the district court, but only mention that claim in one short footnote in their brief to us. We reject this claim on the reasoning of the district court. *See Satellite Broad. & Communications Ass'n of America v. FCC*, 146 F.Supp.2d 803, 832-33 (E.D.Va. 2001).

The Copyright Clause gives Congress the power to "promote the Progress of Science . . . by securing for limited times to Authors . . . the exclusive right to their writings." U.S. Const. art. I, § 8, cl. 8.[10] The Copyright Clause, the satellite carriers point out, was meant to promote the public welfare by encouraging creative work. The carriers contend that SHVIA exceeds Congress's authority under the Copyright Clause because the statute plays favorites by using the copyright power to protect the speech of independent local broadcasters. The Copyright Clause does place some limits on congressional power. For example, the clause does not permit Congress to grant permanent copyright protection to an author. Nevertheless, as the Supreme Court has recognized, Congress's powers under the clause to grant copyright protection and to define the scope of that protection are very broad: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors. . . . [T]his task involves a difficult balance between the interests of authors . . . in the control and exploitation of their writings . . . on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The copyright power certainly includes the authority to grant statutory copyright licenses like those created by SHVIA and the Cable Act. These statutory

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[10] In the language of the day, "science" included works of authorship. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1564 n.4 (Fed. Cir. 1988).

licenses are designed to ensure that the high transaction costs involved in privately acquiring copyright clearances for the retransmission of broadcast programming do not unduly restrict the free flow of information to the public. *See* U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, at 32 (1997). We see no reason why the Copyright Clause would prohibit Congress from conditioning its grant of a statutory copyright license on compliance with the carry one, carry all rule. That rule protects independent broadcasters against the loss of viewership that would result if satellite carriers were allowed to cherry pick the major network affiliates in those stations' local markets. The rule thereby serves to prevent the statutory copyright license from being used to undermine the government's interest in ensuring that over-the-air viewers continue to receive a rich mix of information and programming from a multiplicity of local broadcast sources. In other words, Congress structured SHVIA's statutory copyright license in a way that will ensure the free flow of ideas and information to over-the-air viewers. In doing this, Congress was simply performing its constitutionally assigned task of striking a balance between the interests of authors and the public interest. Accordingly, we hold that Congress acted within its power under the Copyright Clause when it imposed the carry one, carry all rule.

The satellite carriers also argue that the carry one, carry all rule violates the Takings Clause. They claim that the rule works a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because it limits their right to exclude the unwanted signals of local

television stations from their property. The argument fails because the Supreme Court has made clear that a *per se* taking under *Loretto* must involve "required acquiescence" in a permanent physical occupation of property. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987) (holding that Pole Attachments Act does not effect a *per se* taking because it does not require utility companies to provide space on their utility poles to cable companies). Here, the statute does not *require* the satellite carriers to do anything. It merely places conditions on their use of a benefit (the statutory license) the government need not have conferred. This cannot be an unconstitutional taking of the satellite carriers' property.

IV.

Certain broadcast representatives, in their petition for review, challenge one aspect of the FCC's SHVIA Order as "arbitrary, capricious . . . or otherwise not in accordance with law" under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). In paragraph 99 of the order the FCC considered the implementation of 47 U.S.C. § 338(d), which requires satellite carriers offering local-into-local service to "provide access to [a local television] station's signals at a nondiscriminatory price and in a nondiscriminatory manner." Broadcasters argued to the FCC that the statute requires satellite carriers to offer all broadcast stations in a local market as part of one viewing package, but the FCC rejected that argument as follows:

> [S]ection 338's anti-discrimination language prohibits satellite carriers from implementing pricing schemes that effectively deter subscribers

> from purchasing some, but not all, local television signals. Thus, we find that a satellite carrier must offer local television signals, as a package or a la carte, at comparable rates.

SHVIA Order at ¶ 99.

It is this a la carte rule that the broadcasters challenge. As originally issued, the a la carte rule would apparently have allowed satellite carriers a great deal of flexibility in packaging local stations for their subscribers. For example, the rule might have allowed satellite carriers to offer a package of the four major network affiliates in a local market while offering any additional stations on an a la carte basis. This option was of particular concern to broadcasters, who argued that allowing stations to be packaged in this manner would effectively deter many satellite subscribers from purchasing the signals of independent broadcast stations. During the pendency of this appeal, however, the FCC issued a Reconsideration Order which clarifies the a la carte rule adopted in paragraph 99 of the original SHVIA Order. The FCC has now declared that allowing satellite carriers to offer some stations (for example, major network affiliates) as a package while offering other local stations on an a la carte basis would violate the nondiscrimination requirement in § 338(d). *See* Reconsideration Order at ¶ 48. The a la carte rule, as clarified in the Reconsideration Order, allows satellite carriers to give their subscribers two basic choices: subscribers may buy all local stations as one package, or they may buy the individual stations on an a la carte basis. As any objections to the FCC's original a la carte rule are now moot, we need only

consider whether this newly clarified two-option a la carte rule can survive the broadcasters' challenge.

We must first consider the FCC's argument that the broadcasters' attack on the a la carte rule is not ripe for review. Ripeness determinations depend on both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Here, the rule is a final agency action, and the FCC has no interest in further "crystallizing its policy before that policy is subject to review." *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 465 (4th Cir. 1999) (internal quotations marks and citation omitted). Moreover, the broadcasters' challenge is fit for decision because it raises purely legal questions: whether the a la carte rule is an unreasonable interpretation of § 338(d), and whether the FCC has articulated a reasonable explanation for its action in adopting the rule. *See Pacific Gas*, 461 U.S. at 201 (stating that "predominantly legal" issues are fit for decision even when further factual development would be helpful). In addition, any hardship considerations weigh in favor of deciding the questions now because the broadcasters have an interest in knowing which packaging options for local broadcast stations will be available to satellite subscribers when the carry one, carry all rule takes effect. We therefore hold that the legal challenge raised by the broadcasters is ripe for review.

The broadcasters first claim that the a la carte rule is not in accordance with law under 5 U.S.C. § 706(2)(A) because the FCC unreasonably interpreted the nondiscrimination requirement in § 338(d) of SHVIA. We

review this claim under the well-known standards articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron* we first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Here, we ask if Congress explicitly decided whether satellite carriers should be required to offer local stations to their subscribers in only one configuration, specifically, a single package including all of the stations in a given television market. If we can discern Congress's intent on this issue by using "traditional tools of statutory construction," *id.* at 843 n.9, we must give effect to that intent. If, however, the statute is "silent or ambiguous" about the issue, we must defer to the agency's reasonable construction of the statute. *Id.* at 843-44.

The broadcasters argue that if we consider the structure and purposes of SHVIA as a whole, we will see that Congress expressed its clear intent that satellite carriers be required to offer all local stations in a market as part of one package. The broadcasters claim that Congress sought to ensure that every local broadcast station could reach every household in its market. According to the broadcasters, this goal will be undermined if satellite subscribers are allowed to choose to subscribe to some local stations but not others. Broadcast stations not chosen by satellite *customers*, they suggest, will lose access to parts of their audiences just as surely as if they had been denied carriage by satellite *carriers*. The broadcasters explain that the a la carte rule will hurt the ratings of non-chosen stations because "[m]any people who might

not choose to purchase an entire signal would nonetheless watch particular programs on that station if the signal reached their television set as it would over-the-air or through cable." Reply Brief for Petitioner NAB at 19.

The broadcasters fail to show that Congress clearly expressed the intent to require that all local stations be offered in a single package. As the FCC points out, Congress knew how to impose such a requirement. It did so explicitly in the Cable Act. *See* 47 U.S.C. § 543(b)(7).[11] SHVIA says only that carriers must offer local stations at a "nondiscriminatory price and in a nondiscriminatory manner." *Id.* § 338(d). As the FCC also points out, "nondiscriminatory pricing" seems to contemplate the possibility that local stations will be offered separately. This is so because a carrier could not make discriminatory pricing decisions if all local stations had to be offered only as part of a single package. We conclude, therefore, that Congress has not clearly expressed its intentions on the issue of whether satellite carriers should be required to offer all local stations as part of a single package. Accordingly, we ask only whether the FCC's interpretation of the statute is reasonable. It easily meets that standard because, as we have just explained, the statutory language contemplates the possibility that stations will be

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[11] We recognize that the basic tier requirements imposed on cable operators by 47 U.S.C. § 543(b) are far more extensive than the rule the broadcasters would have the FCC impose on satellite carriers. Nevertheless, the basic tier rules show that Congress is quite capable of clearly dictating the manner in which local stations must be packaged. It failed to do this in § 338(d).

offered to subscribers on an individual basis. We therefore reject the broadcasters' argument that the a la carte rule is contrary to the statute.

The broadcasters also argue that the a la carte rule is arbitrary and capricious under 5 U.S.C. § 706(2)(A). Although the scope of review under this standard is narrow, the agency is required to articulate a "satisfactory explanation for its action [that demonstrates] a rational connection between the facts found and the choice made." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). The broadcasters roundly criticize the FCC's reasoning in adopting the a la carte rule. We conclude, however, that the FCC's adoption of the a la carte rule was not an irrational response to the statute and the administrative record. Although the broadcasters claim that the a la carte rule harms local television stations and offers no corresponding benefits, the FCC has plausibly explained that the rule promotes consumer choice. *See* Reconsideration Order at ¶ 46. In the end, the FCC's a la carte rule does little more than restate the statutory language of § 338(d). That language requires "nondiscriminatory prices," while the a la carte rule says that carriers may offer stations a la carte at "comparable rates." We therefore hold that the FCC's decision to adopt the a la carte rule was not arbitrary and capricious.

V.

For the foregoing reasons, we hold that the carry one, carry all rule does not violate the Constitution and that the a la carte rule is not arbitrary and capricious or

contrary to law. Accordingly, the order of the district court is affirmed, and the petitions for review of the FCC's SHVIA Order are denied.[12]

No. 01-1151 – *PETITION DENIED*

No. 01-1271 – *PETITION DENIED*

No. 01-1272 – *PETITION DENIED*

No. 01-1818 – *AFFIRMED*

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[12] The satellite carriers have moved for an injunction against implementation of the carry one, carry all rule "pending final disposition of these cases by the Supreme Court of the United States." The motion is denied.

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 01-1151
99-363
00-96

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA;

Respondents

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING; NATIONAL ASSOCIATION OF BROADCASTERS; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED

Intervenors

NO. 01-1271
99-363
00-96

ECHOSTAR SATELLITE CORPORATION

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA;

Respondents

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING; NATIONAL ASSOCIATION OF BROADCASTERS; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED

Intervenors

NO. 01-1272
99-363
00-96

NATIONAL ASSOCIATION OF BROADCASTERS;

Petitioner

PAXSON COMMUNICATIONS CORPORATION

Intervenor

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA;

Respondents

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC

BROADCASTING; CONSUMER FEDERATION OF AMERICA; OFFICE OF COMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED

Intervenors

On Petition for Review of an Order of the Federal Communications Commission.

(Filed Dec. 7, 2001)

In accordance with the written opinion of this Court filed this day, the Court enforces the decision of the Federal Communications Commission.

/s/ Patricia S. Connor
CLERK

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 01-1818
CA-00-1571-A

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION; ECHOSTAR COMMUNICATIONS CORPORATION; DISH, LIMITED, d/b/a DISH Network; DIRECTV ENTERPRISES, INCORPORATED; DIRECT OPERATIONS, INCORPORATED; DIRECTV, INCORPORATED

Plaintiff-Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION; WILLIAM E. KENNARD, Chairman; SUSAN NESS, Commissioner, in her official capacity; HAROLD FURCHTGOTT-ROTH; MICHAEL K. POWELL, Commissioner, in his official capacity; GLORIA TRISTANI, Commissioner, in her official capacity; UNITED STATES COPYRIGHT OFFICE; LIBRARY OF CONGRESS; JAMES H. BILLINGTON, Librarian of Congress; MARY PETERS, Register of Copyrights, in her official capacity; UNITED STATES OF AMERICA;

Defendants-Appellees

NATIONAL ASSOCIATION OF BROADCASTERS; THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INCORPORATED; THE UNIVISION NETWORK LIMITED PARTNERSHIP AND UNIVISION TELEVISION STATIONS, INCORPORATED; ASSOCIATION OF AMERICA'S PUBLIC TELEVISION

STATIONS; PUBLIC BROADCASTING SERVICE; CORPORATION FOR PUBLIC BROADCASTING

Intervenors/Defendants-Appellees

v.

PEGASUS COMMUNICATIONS CORPORATION; CHANNEL MASTER LLC

Parties in Interest

CONSUMER FEDERATION OF AMERICA; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST, INCORPORATED

Amici Curiae

and

NATIONAL CABLE SATELLITE CORPORATION (C-SPAN); SPACE SYSTEMS/LORAL, INCORPORATED; PAXSON COMMUNICATIONS CORPORATION; NATIONAL ALLIANCE FOR MEDIA ARTS & CULTURE; ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS; VIRGINIA CITIZENS CONSUMER COUNCIL; CONEXANT SYSTEMS, INCORPORATED; BROADCOM CORPORATION

Movant

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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(Filed Dec. 7, 2001)

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1151(L)
(CA-00-1571-A)

Satellite Broadcasting, etc.,

Petitioner,

versus

Federal Communications Commission, et al.,

Respondents.

ORDER

(Filed: January 31, 2002)

The court amends its opinion filed December 7, 2001, as follows:

On page 22, second paragraph, line 17; page 30, first full paragraph, lines 17 and 20; and page 30, footnote 7, line 3 – the references to "SBAC" are corrected to read "SBCA."

On page 29, second full paragraph, line 8, and page 33, first paragraph, line 18 – the font at the end of the citations (the last "C" in "FCC" and "PAC") is corrected to Italic.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1151(L)
(CA-00-1571-A)

Satellite Broadcasting, etc.,

Petitioner,

versus

Federal Communications Commission, et al.,

Respondents.

ORDER

(Filed: February 13, 2002)

The court further amends its opinion filed December 7, 2001, and amended January 31, 2002, as follows:

On page 21, first paragraph, line 25 – the reference to "SBAC" is corrected to read "SBCA."

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,	)	Civil Action No. 00-1571-A
Plaintiffs,	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,	)	
Defendants,	)	
and	)	
NATIONAL ASSOCIATION OF BROADCASTERS, et al.,	)	
Defendant-Intervenors.	)	

MEMORANDUM OPINION

This case involves satellite carriers' facial challenge to the constitutionality of the copyright license created by the Satellite Home Viewer Improvement Act of 1999 and the license's "must carry" provisions under the First and Fifth Amendments to the Constitution. In essence, the satellite carriers assert that the "must carry" provisions of the new copyright license infringe upon carriers' First Amendment right to control program content and effect a "taking" of property in violation of the Fifth Amendment because the carriers are required to carry certain stations in a given market if the carriers want to take advantage of the copyright license in that market.

The specific issues before the Court are whether Plaintiffs have pled a cause of action that (1) the Satellite Home Viewer Improvement Act of 1999 ("SHVIA" or "Act"), on its face, violates satellite carriers' First Amendment rights; (2) Congress has exceeded its authority in promulgating SHVIA; (3) SHVIA effects a taking of satellite carriers' private property without just compensation in violation of the Fifth Amendment Takings Clause; and (4) SHVIA deprives satellite carriers of their property without due process in violation of the Fifth Amendment Due Process Clause.

The problem that led Congress to pass SHVIA was that, for the most part, satellite carriers did not transmit local television stations as a part of their basic satellite packages unless they secured permission from broadcasters or secured copyright licenses to retransmit the works of copyright holders. In practical terms, a satellite home subscriber could use their satellite dish to receive premium programs like Home Box Office ("HBO") programs, but the home viewer could not use their satellite dish to receive local news, and local independent and public programming. Home viewers were required to switch their televisions to local stations via antenna or cable television. This dual technology problem created an undesirable limitation on the home viewer's access to local television programs. This situation also created pressure on the home viewer to opt against satellite television, and to select cable television options, or to ignore the advances in technology and rely upon traditional broadcast free television.

As the spectrum of satellite programs expanded nationally, the limit on access to local news and programming inhibited the wide flow of information to television home viewers. Congress enacted SHVIA in response to the growing concern about the future of free television and the promotion of competition, and in recognition that the Copyright Act might have been impeding development of the satellite broadcast medium and local programming.

The satellite carrier plaintiffs welcome the grant of a copyright license to retransmit the copyrighted works of others without having to pay royalties, but they object to the Act's requirement that, as a condition to carrying a single station in a geographic market area royalty-free, the satellite carriers "must carry" (i.e., retransmit) all local television stations in that geographic area upon request of the local station. Plaintiffs assert that the must-carry provisions are unconstitutional. The satellite carrier plaintiffs' constitutional objections, while substantial, are not well taken.

The Court holds that the Satellite Home Viewer Improvement Act of 1999 is constitutional and does not in any way violate the First and Fifth Amendment rights of satellite carriers. Moreover, the Act is a proper exercise of Congress' plenary powers over copyright and Congress' power to promote the free and full exchange of information over the broadcast spectrum. In considering the satellite carriers' First Amendment claims, the Court holds first that SHVIA is subject to review using intermediate scrutiny. Next, the Court finds that the must-carry provisions do not violate Plaintiffs' First Amendment rights because (1) neither the provisions' language nor their

purpose are content-based; (2) the provisions are within the authority granted to the Government under the Copyright Clause; (3) the must-carry provisions further important governmental interests that are unrelated to the suppression of free expression; and (4) any incidental restriction on satellite carriers' First Amendment freedoms is no greater than necessary to further the Government's interests. With respect to the satellite carriers' Fifth Amendment claims, the Court holds that SHVIA does not effect a taking of satellite carriers' property because the carriers may choose to accept or decline a free copyright license to retransmit the local programs of any given market. Satellite carriers decide whether to incur the must-carry obligations because the obligations travel with the optional copyright license into various markets. Moreover, SHVIA's copyright license has the potential to expand the value of satellite carriers' property. Finally, the Court holds that the must-carry regulations do not violate due process because Congress has acted within its authority in promulgating the must-carry provisions, and the regulations do not strip satellite carriers' property of all of its value.

For these reasons, the Court does not sustain the satellite carriers' constitutional objections to SHVIA. Therefore, the Court grants Defendants' motions to dismiss for the reasons detailed below.

I. BACKGROUND

Plaintiff Satellite Broadcasting and Communications Association of America ("SBCA") is a nonprofit national

trade association that represents all segments of the satellite industry. SBCA represents the interests of its members in protecting and expanding the use of satellite technology. Plaintiffs DIRECTV Enterprises, Inc., DIRECTV Operations, Inc., DIRECTV, Inc. (collectively "DIRECTV"), and Plaintiffs Echostar Communications Corporation ("ECC") and ECC's wholly-owned subsidiary Dish Ltd., d/b/a "The Dish Network" (collectively "Echostar") are competing satellite carriers that provide satellite television service to subscribers over direct broadcasting satellite ("DBS") systems. Satellite carriers are unlike cable system operators. Because satellites are a national medium, satellite carriers do not compete with local stations for local advertising revenues. Also, unlike most cable operators, satellite carriers do not enjoy a monopoly over service in their service territory. Satellite carriers compete with each other and with cable systems nationwide.

In 1999, Congress enacted the Satellite Home Viewer Improvement Act of 1999. Prior to enactment of the Act, direct-to-home satellite carriers such as Plaintiffs could not, with limited exceptions, include local television stations in the programming packages they offered subscribers. Congress had amended the Copyright Act in 1976 to grant owners of copyrights in audiovisual work, such as television programs, the exclusive right to perform or display the copyrighted work publicly, or to authorize a public display of the work. *See* 17 U.S.C. §§ 106(4), (5). Therefore, satellite carriers focused on broadcasting specialized premium channels and not local television stations' programming because retransmitting local programming required carriers to obtain copyright

licenses. SHVIA created a new statutory copyright license, permitting, but not requiring, satellite carriers to engage in satellite retransmission of a local television station signal into the station's own designated market area ("DMA") without the need to identify and obtain authorization from copyright owners to retransmit the owners' programs. *See* 17 U.S.C. § 122.

The SHVIA license is similar to the cable systems operators' license created in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 (1992). In passing SHVIA, Congress sought to enable satellite carriers to compete more effectively with cable television operators in the marketplace by granting carriers a statutory copyright license similar to the license that had long been afforded cable operators. At the same time, Congress placed a "shall carry" (i.e., "must-carry") requirement on any satellite carrier employing the satellite copyright license.

Specifically, 47 U.S.C. § 338(a) requires a satellite carrier that chooses to carry one local broadcast television station to carry *every* local broadcast station within that market (DMA) *upon request*. The requirement is analogous to the requirement accompanying cable operators' statutory license that the operators carry local broadcast television stations within the operators' local markets. However, the must-carry requirements associated with the satellite carriers' license to transmit local television stations was drafted with modifications in recognition of the practical differences between the cable industry and the satellite industry. SHVIA's carriage obligations, unlike cable's corresponding "must-carry" requirement, apply only on a market-by-market basis; thus, unlike

cable must-carry requirements, SHVIA allows satellite carriers to choose whether to incur must-carry obligations in a particular market in exchange for the benefits of the statutory license. In addition, carriers have no obligation to carry more than one local station in a market affiliated with a particular network. Furthermore, carriers may elect not to take advantage of the license created by SHVIA and, instead, may contract with stations or copyright owners individually in order to narrow the selection of local stations a carrier transmits. Also, SHVIA does not impose the same channel-positioning restrictions imposed on cable operators.

The satellite carriers' must-carry requirement takes effect on January 1, 2002. Plaintiffs have filed a Complaint seeking declaratory judgment that the must-carry provisions of § 338 are beyond Congress' constitutional authority under the Copyright Clause, violate the Speech and Press Clauses of the First Amendment, and violate the Takings and Due Process Clauses of the Fifth Amendment. Plaintiffs also seek to enjoin several federal defendants from promulgating any rules or regulations or taking any other steps to enforce the allegedly unconstitutional aspects of § 338. The federal defendants that Plaintiffs seek to enjoin are the Federal Communications Commission ("FCC"), the FCC's Chairman (William E. Kennard), the FCC's Commissioners (Susan Ness, Harold Furchtgott-Roth, Michael K. Powell, and Gloria Tristani), the United States Copyright Office of the Library of Congress, the Librarian of the Library of Congress (James H. Billington), and the Registrar of Copyrights (Marybeth

Peters).[1] The Court has granted the request of several organizations to intervene as defendants.[2] Defendants move to dismiss Plaintiffs' Complaint.

II. PARTIES' CONTENTIONS

A. Federal and Intervenor Defendants

As an initial matter, Defendants assert that Plaintiffs' as-applied claims are not ripe for judicial review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). They assert that the Court should not rule on Plaintiffs' claims at this time because the issues are "likely to stand on much surer footing" at a later date. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967). To determine ripeness, the Court should examine (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *See Abbott Labs.*, 387 U.S. at 149; *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 665 (4th Cir. 1997). Defendants assert that, for each Plaintiff, the claims hinge on contingent events, acts of third parties not before the Court, and unpredictable future developments in satellite technology that may or may not occur before January 1, 2002; therefore, Defendants argue, the claims are not ripe. *See Texas v. United*

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[1] The individuals that Plaintiffs seek to enjoin Plaintiffs sue in their official capacities.

[2] The parties that have intervened as defendants are the National Association of Broadcasters, Association of Local Television Stations, Inc., Univision Network Limited Partnership, Univision Television Group, Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting.

States, 523 U.S. 296, 300 (1998) (stating that a claim is not ripe when it rests on contingent events that may not occur when anticipated, if at all); *Abbott Labs.*, 387 U.S. at 149, (stating that a claim is not fit for review if the dispute is not a purely legal one, but one on which the court could benefit from further factual development); *Arch Mineral*, 104 F.3d at 665 (same). Just one example of a future event upon which Plaintiffs' claims are contingent is the fact that the § 338 must-carry provisions are triggered only if Plaintiffs choose to retransmit local stations within a given market, and only if Plaintiffs choose ~~to~~ rely on the § 122 license. Also, as noted by Plaintiffs, satellite technology may change over the coming year. (Compl. ¶¶ 6, 33.) Defendants assert that Plaintiffs' statements about how many channels it will be required to carry, what their channel capacity is, and what their carriage obligations will be are all contingent on present technology. (*Id.* ¶¶ 6, 26, 26, 31-33.)

Furthermore, Defendants argue, the hardship prong of the ripeness test disfavors a ruling on Plaintiffs' claims at this time. Defendants contend that because the carriage obligations do not become effective until January 1, 2002, Plaintiffs will not suffer any "immediate, direct, and significant" hardship if the Court withholds consideration of their claims. *See West Virginia Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 801 (4th Cir. 1998) (stating that a court must decide whether postponing review will cause "immediate, direct, and significant" harm to plaintiffs); *Kemler v. Poston*, 108 F. Supp. 2d 529, 542 (E.D. Va. 2000) (holding that courts should determine whether the harm of deferring review outweighs the benefits deferment will bring the court).

As to the merits of Plaintiffs' claims, Defendants argue that SHVIA is within the scope of Congress' power under Article I of the Constitution. Defendants assert that Congress has broad authority under the Copyright Clause to define the scope of the rights of copyright holders. *See Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429-32, 456 (1984). Defendants contend that, because Congress is entrusted with deciding which specific category of "Writings" should be brought within the purview of the statutory scheme, Congress has the power to use copyright, or exceptions thereto, to promote particular types of work, or works by particular authors, in preference to other types of works or authors. *See Goldstein v. California*, 412 U.S. 546, 562 (1973). Congress also has the authority to determine the degree of copyright protection in light of advancing technology. *See Sony*, 464 U.S. at 431. Defendants assert, in short, that Congress has acted properly within its obligations of balancing the competing considerations of copyright, communications, antitrust policy, and the economy. *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 401 (1968); *Goldstein*, 412 U.S. at 562 (stating that Congress can consider the commercial importance of a product on the economy). The Supreme Court has already noted that Congress acted within its power regarding the analogous "must-carry" provisions in the cable industry. *See Capital Cities Cable v. Crisp*, 467 U.S. 691, 710 (1984) (referencing the Copyright Revision Act of 1976, which introduced cable's must-carry provisions).

Defendants also argue that Congress acted within its powers under the Commerce Clause in regulating satellite transmissions of television broadcasts in a way that

promotes competition. *See United States v. Lopez*, 514 U.S. 549, 558 (1995) (stating that Congress may regulate channels of interstate commerce, instrumentalities of that commerce, and activities that substantially affect that commerce). Defendants assert that the "channels of interstate commerce" that Congress has authority to regulate include television and radio broadcast frequencies, *see Gibbs v. Babbitt*, 214 F.2d 483, 490-91 (4th Cir. 2000), and satellite communication frequencies, *see United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997). Under the Commerce Clause, Congress can regulate broadcast communication. *See FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984).

Defendants also assert that SHVIA complies with the requirements of the First Amendment. Defendants emphasize that SHVIA *permits* satellite carriers to retransmit local broadcast television programming. The carriers have the choice to accept or to decline to accept the benefits of the license created by SHVIA. Thus, Defendants argue that there is no state interference with a protected activity here, only the encouragement of an alternative activity consonant with legislative policy (i.e., carrying local television stations). *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (drawing a distinction between the two). Defendants contend that SHVIA actually *expands* Plaintiffs' options by permitting them to retransmit broadcasts without being subject to copyright restrictions. *See* 17 U.S.C. §§ 122(a), (c). Plaintiffs have the choice of whether to invoke the license created by SHVIA; therefore, the local carriage obligations are not "coercive." *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983)

(indicating that Congress does not exceed its powers by encouraging actions deemed to be in the public interest); *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991) (stating that the government does not violate the First Amendment by offering certain choices). Defendants contend that if Plaintiffs choose not to invoke the SHVIA license, Plaintiffs can still carry programming for which they can obtain property rights. Defendants assert that if Plaintiffs are unable to obtain rights to some broadcasts, it is the necessary consequence of the copyright laws and does not violate the First Amendment. *See Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *United Video v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (stating that there is no First Amendment right to make commercial use of the works of others).

Defendants also argue that, even if SHVIA does burden Plaintiffs' speech under the First Amendment, SHVIA does not violate the First Amendment because it contains content-neutral provisions that are narrowly tailored to further the substantial government interests of promoting parity between the cable and satellite industries for purposes of competition, making diverse voices available to viewers, and protecting consumers against rate increases. Defendants argue that SHVIA must-carry provisions are content-neutral, like the cable "must-carry" rules at issue in *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 643 (1994). Defendants assert that the provisions by their terms do not favor or disfavor speech based on the ideas or views expressed in the speech. *See id.* at 642-43. Defendants assert that the applicability of SHVIA's carriage provisions is not triggered by viewpoint, but turns only on whether Plaintiffs choose to

retransmit television broadcasts within a particular geographic market, and whether Plaintiffs independently secure the rights to broadcast copyrighted works or choose to invoke the SHVIA license to do so. Defendants argue that, furthermore, the purposes, design, and operation of SHVIA are content-neutral. *See Turner I*, 512 U.S. at 647, 649 (indicating that must-carry provisions did not violate First Amendment where they did not require or prohibit carriage of particular ideas or points of view, did not penalize cable providers because of the content of their programming, did not compel the affirmation of certain views, did not produce a net decrease in the amount of speech, and still permitted providers to carry whatever programming they wished on channels not subject to the must-carry rules).

Defendants contend that, due to their neutral content and intent, as with the cable "must-carry" rules, the satellite must-carry provisions should be upheld because they advance an important governmental interest and do not burden substantially more speech than necessary. *See Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997). Defendants urge that, in fact, regulations of satellite transmissions are subject to "a less rigorous standard of First Amendment scrutiny" than those of the cable industry. *See Turner I*, 512 U.S. at 637-38; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969).

Defendants also argue that SHVIA does not effect a taking of Plaintiffs' property without just compensation. Defendants assert that the Act does not effect a *per se* taking because there is no permanent physical occupation of Plaintiffs' property that deprives Plaintiffs of the rights to possess, use, and dispose of their property. *See Loretto*

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982). Defendants assert that the statute permits Plaintiffs to do everything with their property now that they could do before the Act was passed, as long as Plaintiffs obtain permission from copyright owners. Defendants contend that SHVIA actually gives Plaintiffs more rights than they had before the Act was passed, because Plaintiffs can voluntarily enter into a situation where they need not obtain copyright owners' permission. Defendants also argue that there is no regulatory taking effected by SHVIA because Plaintiffs are not denied "all economically viable use" of their property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980). Plaintiffs may use their property as they see fit. As noted, SHVIA actually eliminates a class of burdens on what Plaintiffs may do with their property, thereby enhancing, not diminishing, the value of the property.

Finally, Defendants assert that SHVIA does not violate the due process requirements of the Fifth Amendment. There are three elements to a cognizable substantive due process claim involving property: (1) "the claimant must establish possession of a property interest," (2) "state action must deprive the claimant of the property interest," and (3) "the state's action must fall 'so far beyond the outer limits of legitimate government action that no process could cure the deficiency.' " *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 288 (4th Cir. 1998). Although Plaintiffs do have a property interest in their real property, facilities, satellites, and spectrum capacity, for the reasons stated above in Defendants' takings discussion,

Defendants contend that SHVIA does not deprive Plaintiffs of any interest in their property, real or personal, but actually expands, on a voluntary basis, what Plaintiffs can do with their property. Also, Defendants argue that the third due process element is not met, because, as explained above, Congress has acted within its regulatory power to achieve legitimate ends. *See* H.R. REP. NO. 106-464, at 90-95, 101 (stating that the purpose of SHVIA is to promote competition in the multi-channel video programming marketplace in a manner consistent with the strong public interest in providing viewers with information from a variety of sources); *Turner I*, 512 U.S. at 664 (recognizing that both of these objectives are substantial government interests within the limits of government action).

B. Plaintiffs

As an initial matter, Plaintiffs argue that their facial challenge to the constitutionality of SHVIA is ripe for judicial resolution. Plaintiffs emphasize that, contrary to Defendants' assertion, Plaintiffs do not bring an "as-applied" challenge to the must-carry provisions of SHVIA; they bring a facial challenge to the statute. Plaintiffs argue that 47 U.S.C. § 338(a) includes a speech- and speaker-based restriction that burdens and chills the exercise of Plaintiffs' editorial discretion, irrespective of the technological limits on Plaintiffs' channel capacity. Plaintiffs contend that this "purely legal" issue is fit for judicial review. *See Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 581 (1985) (finding that where issue presented was purely legal, case was ripe). Furthermore, Plaintiffs

contend that the harm to Plaintiffs will eventually materialize because as long as a single local station opts for the must-carry under SHVIA, Plaintiffs will suffer *some* harm to their editorial discretion. Also, Plaintiffs contend that they currently suffer harm because their decisions concerning what programming to carry now as well as in 2002 are effected by the anticipated effects of must-carry.

In opposition to Defendants' substantive arguments, Plaintiffs assert that satellite carriers exercise editorial discretion in their selection of programs. Plaintiffs argue that carriers create their own speech, such as on-air programming guides, to inform consumers of available programming. Plaintiffs assert that satellite carriers do not have unlimited channel capacity to carry all of the video programming, music programming, and other programming currently available. Therefore, Plaintiffs argue, SHVIA's must-carry requirement necessarily limits which programming satellite carriers can provide, and where, thus infringing on carriers' editorial discretion. The channel capacity consumed by local stations already prevents satellite carriers from carrying any local stations in numerous mid-sized and smaller local markets.

Plaintiffs assert that even if satellite carriers did have unlimited capacity, they would nonetheless exercise discretion in selecting which local stations to include, based on popularity of programming among consumers, the carrier's programming goals, whether the local stations are duplicative of national and regional programming

already offered, and other considerations.[3] Plaintiff argues that the must-carry provisions impose the onerous burden of compelling Plaintiff to display numerous unwanted copyrighted works contrary to Plaintiffs' will.

Essentially, Plaintiffs argue that, under *Miami Herald Publishing Co. v. Tornillo,* the Government cannot require Plaintiffs to carry speakers unwanted by Plaintiffs but favored by the Government (e.g., independent broadcasters) as the price for carrying other desired speakers (e.g., network affiliated broadcasters). 418 U.S. 241 (1974). Plaintiffs argue that Defendants seek to defend the must-carry requirement by resurrecting the "rights-privilege" distinction, which allows the Government to condition a "privilege" on a citizen's waiver of a constitutional right. According to Plaintiffs, Defendants characterize the lifting of the copyright restrictions on retransmitting copyrighted broadcast programming as a privilege; therefore, being able to use editorial discretion in the absence of the copyright restrictions is also a privilege. Plaintiffs assert that the Government cannot require Plaintiffs to broadcast unwanted speakers simply because the Government believes that inclusion of unwanted speakers furthers the public interest. Plaintiffs submit that the Government cannot condition a copyright license upon the requirement that satellite carriers retransmit the generally favored speech of various local television stations. Plaintiffs argue that such a requirement is analogous to the Government passing a law requiring newspaper editors

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[3] Arguably, the carrier's decisions could reflect the image the carrier wants to project, etc. (e.g., a more family-oriented carrier in some markets, or a more "hip" carrier in others).

to seek out and grant space for contrary points of view within their newspapers. *See generally Miami Herald*, 418 U.S. 241. The Supreme Court in *Miami Herald* held that it was impermissible for the Government to require a newspaper that printed one person's editorial point of view to require the newspaper to give equal space (i.e., grant a "right to reply") to a person of the opposing view. *See id.* at 258. Plaintiffs contend further that just as it would be improper for the Government to condition a newspaper's antitrust immunity or "shield law" protection of confidential sources upon the newspaper's voluntary adoption of the unconstitutional "right to reply" regime, it is unconstitutional for Congress to condition a satellite carriers' copyright license to retransmit copyrighted works upon the carriers' voluntary adoption of a "must-carry" regime.

Plaintiffs further assert that the § 122 copyright license cannot be justified as a government subsidy to the carriers. When Congress exercises its spending power, it may refrain from supporting certain speech or constitutionally-protected activity. *See Rust*, 500 U.S. at 197 (stating that Congress does not penalize abortion by refraining from underwriting it through direct cash payment or tax subsidies); *Regan*, 461 U.S. at 546, 548-49 (indicating that Congress does not penalize lobbying by refraining from giving direct cash payments or tax subsidies); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (stating that a refusal to fund protected activity, without more, cannot be equated with a penalty on that activity). Plaintiffs assert that the § 122 copyright license is not a subsidy because the Government is not exercising its

"spending" powers; only regulatory powers are implicated in the § 122 license and the § 338 must-carry provision. Plaintiffs argue that there is no rule that a government can use its regulatory powers to influence or penalize speech, or as leverage to influence a private actor's own speech. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (White, J., dissenting) (opining that suspension of government regulation – in other words, granting of a license – is not analogous to a financial subsidy); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 6 n.4, 17 n.14, 18 n.15 (1986) (holding that status as a regulated company did not reduce a company's right to be free from state regulation that burdens speech); *League of Women Voters*, 468 U.S. at 378-80, 383-84; *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (stating that the government may deny a benefit but may not do so on a basis that infringes on someone's constitutionally protected interests). Plaintiffs argue that the cases make clear that the receipt of a valuable, discretionary Government license or permit does not in turn authorize the Government to infringe on the recipient's First Amendment rights. *See, e.g., Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 185, 192 (4th Cir. 1994). Therefore, Defendants' argument that the § 122 license to carry copyrighted works is a subsidy that need not be freely given under all circumstances must fail. "Government regulation may not favor one speaker over another." *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995).

Plaintiffs contend further that the § 122 license is not a subsidy because it is not a benefit granted by the Government, but by copyright holders. Plaintiffs assert that Government funds, property, exemptions, or jobs are

not provided. Instead, § 122 manipulates one private party to support another. In addition, Plaintiffs argue that the § 122 license is not a subsidy because it is not really a benefit at all. The permission to retransmit copyrighted works is really the removal of an obstacle of the Government's own creation.

Plaintiffs also argue that the Court should strictly scrutinize SHVIA's must-carry requirement because a satellite carrier exercises First Amendment discretion in making its channel selections. Plaintiffs assert that they can be analogized to cable operators, whom the Supreme Court has held are entitled to the freedom of speech and press provisions of the First Amendment for performing the same activities and exercising the same discretion as do satellite carriers. *See Turner I*, 512 U.S. at 636 (citations omitted); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991). Plaintiffs contend that the must-carry requirements must be given First Amendment scrutiny because they regulate the satellite carrier's protected First Amendment rights. *See Turner I*, 512 U.S. at 637, 643-44. Although the Cable Act's must-carry requirement was not subject to strict scrutiny, Plaintiffs argue that the differences between the statutes compel strict scrutiny of SHVIA. Plaintiffs note that the Supreme Court deemed the Cable Act's must-carry provisions to be content-neutral. *See Turner I*, 512 U.S. at 644, 647. Therefore, the Court reviewed the must-carry provisions under intermediate scrutiny. *See id.* at 662; *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (setting forth intermediate scrutiny standard). Plaintiffs argue that, in contrast, SHVIA's must-carry requirement is not content-neutral; it is directly conditioned on whether the satellite carrier provides a certain form of identified speech (a

local station) or not. A carrier is penalized by reason of the programs or stations it selects. *See Turner 1*, 512 U.S. at 644. Plaintiffs contend that the fact that the carrier's burden to conform is triggered by the speaker (i.e., the chosen station) rather than what is said does not change the fact that the Act "penalize[s] the [satellite carrier's] own expression," in violation of the First Amendment. *See Pacific Gas & Elec.*, 475 U.S. at 9-10; *Turner I*, 512 U.S. at 659 (noting that distinctions among different speakers within a single medium presents First Amendment concerns); *Miami Herald*, 418 U.S. at 256 (evaluating under strict scrutiny a "right-to-reply" statute that forced a newspaper to take up space that could be devoted to other material the paper may have preferred to offer).

Finally, Plaintiffs contend that an additional basis for evaluating SHVIA under strict scrutiny is the fact that the Act serves no rational purpose.

III. DISCUSSION

A. Ripeness

Plaintiffs' claims are ripe for review. Defendants argue that Plaintiffs' "as-applied" claims are not ripe for judicial review. However, Plaintiffs do not bring an as-applied challenge to the must-carry provisions of SHVIA; they bring a facial challenge. (Pl. Opp'n to Mot. to Dismiss at 3.) Plaintiffs argue that the must-carry provisions are speech-triggered in structure, and, as such, they are speech- and speaker-based restrictions on Plaintiffs' freedom of expression. The Court finds that the issue of SHVIA's facial constitutionality is ripe for judicial review

because it will not be clarified by further factual development. *See Thomas v. Union Carbide*, 473 U.S. at 581 (holding that purely legal issues are ripe for review). Plaintiffs "do [ ] not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923), *quoted in Thomas*, 473 U.S. at 581. SHVIA's must-carry provisions become effective January 1, 2002. The potential injury that Plaintiffs allege is sufficiently close in time to warrant the Court's consideration of the must-carry provisions' constitutionality. Plaintiffs are making decisions now about current and post-January 1, 2002 programming and channels that implicate the anticipated SHVIA copyright license.

B. Standard of Review

A Court reviewing a motion to dismiss a complaint brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure accepts the complaint's factual allegations as true and views the allegations in a light most favorable to the non-moving party. *See Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The Court must grant a motion to dismiss for failure to state a claim if it appears to a certainty that the plaintiff cannot prove any set of facts in support of its claim which would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Here, Plaintiffs have made a facial challenge to a Congressional statute, alleging that the statute is unconstitutional. Accordingly, to survive a 12(b)(6) motion to dismiss, Plaintiffs must allege that the statute is unconstitutional in its language or its purpose. Plaintiffs' factual allegations must be supported by the statute in order

for them to demonstrate that they will be able to prove at trial a set of facts in support of their claim which would entitle them to relief. *Cf. Conley*, 355 U.S. at 45-46 (stating that a court must grant a motion to dismiss where the plaintiff cannot prove a set of facts entitling him to relief).

Upon consideration of a federal statute or regulation, the Court begins with a presumption of constitutionality. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that a statute is presumed constitutional); *INS v. Chadha*, 462 U.S. 919, 944 (1983) (stating that statutes are presumed constitutional); *Fairbank v. United States*, 181 U.S. 283, 285 (1901) (stating that, for an act of Congress, "[t]he presumptions are in favor of constitutionality"). As the party challenging the statutory scheme, Plaintiffs bear the burden of demonstrating its unconstitutionality. *See Lujan v. G & G Fire Sprinklers, Inc.* 121 S. Ct. 1446, 1452 (2001) (citing *INS v. Chadha*, 462 U.S. at 944); *Heller*, 509 U.S. at 320 ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Accompanying the presumption of constitutionality, the Court must determine what level of scrutiny to give the Congressional act at issue here. Different levels are applicable depending on the nature of a statute's restriction, if any, upon speech.

C. Intermediate Scrutiny Applies

1. SHVIA is Content-Neutral

SHVIA is not subject to the highest level of scrutiny because neither its language nor its purpose is content-

based. Regulations that are content-based on their face must survive the stringent mode of constitutional analysis termed "strict scrutiny." *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, ___, 120 S. Ct. 1878, 1886 (2000); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To survive strict scrutiny, a government regulation must be narrowly tailored to serve a compelling governmental interest. *See id.* The Court does not need to apply this level of scrutiny to SHVIA.

Plaintiffs cannot demonstrate that the statute on its face, or by its purpose, is unconstitutional, such that compelling satellite carriers to comply with the statute violates the carriers' First Amendment rights. First, the language of the statute does not evidence any content-based distinctions. The statute provides:

> In general: Subject to limitations of paragraph (2), each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).

47 U.S.C. § 338(a). Nowhere in the language of this "must-carry" provision is there any indication as to the kinds of local stations that must be carried, or the nature of the programs the local stations must carry. In fact, Plaintiffs have acknowledged that the language of the statute does not reflect a content preference:

THE COURT: [I am asking] whether there is some particular message here that is favored over the other. Is there any reference to ideas or views in the statute?

MR. COOPER: No, your Honor, there is not.

(Tr. of Mot. to Dismiss Hearing at 40 (Feb. 9, 2001) (interchange between Plaintiffs' counsel and the Court).) The *Turner I* Court has noted that a law is content-based which, by its terms, distinguishes favored speech from disfavored speech on the basis of the ideas or views expressed. 512 U.S. at 643. SHVIA is not such a law. The terms of the SHVIA must-carry provisions do not make any reference to any kind of speech or viewpoint. *See* 47 U.S.C. § 338(a).

The Supreme Court has already found a statute analogous to SHVIA's must-carry rules to be neutral on its face. *See, e.g., Turner I*, 512 U.S. at 643. In *Turner I*, the Supreme Court ruled on the validity of cable must-carry requirements very similar to SHVIA's must-carry provisions. Cable's must-carry rules were more demanding than the provisions at issue here. A brief, contextual description is helpful. Similar to satellite broadcasting – and unlike traditional broadcast television – cable systems relied on physical, point-to-point connections between a transmission facility and the television sets of individual subscribers.[4] *Turner I*, 512 U.S. at 627-28. Cable

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[4] A satellite carrier's point-to-point connection is not physical. Instead, the connection is maintained through a satellite television subscriber's antenna or "dish." (Compl. ¶ 23.) Yet, the dish operates like cable systems' point-to-point

systems transmitted numerous channels to subscribers, but cable's channel capacity was limited. *See id.* at 628. For the most part, cable operated as a conduit for the speech of others, not creating its own programming, but, instead, transmitting programs from outside sources, such as local or distant broadcast stations and national or regional cable programming networks (e.g., CNN, Black Entertainment Television, CourtTV, MTV, Comedy Central). The cable must-carry provisions required cable operators to carry the signals of a specified number of local broadcast television stations, depending on a system's channel capacity and its number of subscribers. *See id.* at 630 (citing the 1992 Cable Act §§ 4, 5, 47 U.S.C. §§ 534(b)(1), (h)(1) (1988 ed., Supp. IV)). A cable system was only obligated to carry a broadcaster if the broadcaster requested carriage, and if more broadcasters requested carriage than a cable system was required to carry, the cable system could choose the stations it would carry. *See id.* at 631. However, the broadcast signals carried under cable's must-carry provisions had to be transmitted on a continuous basis and had to be placed in the same numerical channel position as when broadcast over the air by traditional television broadcast media.

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optical fibers or cables. Only cable subscribers connected to a cable operator's optical fiber or cable could receive programming transmitted by the operator. Similarly, only satellite subscribers that have programmed dishes can receive programming transmitted by the satellite carrier. By contrast, any television owner within a broadcast station's range can receive the programming that traditional broadcast stations radiate, without having a contractual relationship with the broadcast station. *See Turner I*, 512 U.S. at 627-28.

First, the Supreme Court in *Turner I* found that cable operators were engaged in speech. *See id.* at 636. Operators communicated messages on a wide variety of topics and in a wide variety of formats through the operators' original programming or exercise of editorial discretion over which stations or programs to include in their repertoire. *See id.; see also Miami Herald*, 418 U.S. at 258 (finding that newspapers engage in speech by making editorial decisions as to the size and content of the paper, the material that will go into the paper, and the treatment of public issues and public officials). Next, the *Turner I* Court held that the cable must-carry rules regulated cable operators' speech by reducing the number of channels over which operators could exercise unrestricted control and by reducing the number of channels for which the operators could compete. *See Turner I*, 512 U.S. at 636-37, 45. However, the Court further held that "the must-carry rules, on their face, impose[d] burdens and confer[red] benefits *without references to the content of speech.*" *Id.* at 643 (emphasis added). The Court concluded that the speech burdens imposed by the cable must-carry provisions were not *per se* unconstitutional because they were unrelated to content, for the limitations extended to all cable programmers, irrespective of the programming they chose to offer viewers. *See id.* at 644-45. "Nothing in the Act impose[d] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator . . . selected or [would] select." *Id.* at 644.

Similarly, the SHVIA must-carry provisions contain nothing that restrict, penalize, or burden based on the views, programs, or stations that a satellite carrier might select. In the same manner as cable, satellite transmission

constitutes speech. *See id.* at 636. Satellite operates predominantly as a conduit for speech, but satellite carriers communicate ideas through their programming selection. Like cable's must-carry rules, SHVIA's must-carry provisions obligate a satellite carrier to carry a number of local stations within designated market areas, but with the less stringent condition that carriers need only do so if the carriers elect to carry any one local station in a DMA. *See* 47 U.S.C. § 338(a). In addition, like cable's must-carry rules, SHVIA regulates speech "based only upon the manner in which speakers [i.e., stations] transmit their messages to viewers, and not upon the messages they carry." *Turner I*, 512 U.S. at 645. Generally, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content neutral. *See Turner I*, 512 U.S. at 643. Therefore, SHVIA's must-carry regulations are at least as facially neutral as the cable must-carry rules.[5]

Under SHVIA's must-carry provisions, satellite carriers must choose which television station, or "speaker," the carrier will carry. Plaintiffs argue that they will have to carry the "speech" of more local stations than they would otherwise choose. However, a differential burden on speakers alone is not sufficient to raise First Amendment concerns. *See Leathers*, 499 U.S. at 452. Speaker-based laws demand strict scrutiny only "when they

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[5] SHVIA's regulations are arguably less burdensome than cable's because they do not contain a strict requirement that satellite carriers carry local stations. Satellite carriers become obligated under SHVIA's must-carry provisions only if they choose to carry a station in a particular market area. *See* 47 U.S.C. § 338(a).

reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner I*, 512 U.S. at 658; *see also Rosenberger*, 515 U.S. at 828 (holding that the "government offends the First Amendment when it imposes financial burdens on certain speakers *based on the content of their expression*") (emphasis added).

The Supreme Court has held explicitly that *Miami Herald* does not govern a context such as this one: "Unlike the access rules struck down in [*Miami Herald*], the must-carry rules are content neutral in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty." *Turner I*, 512 U.S. at 655. In *Miami Herald*, the choice of speaker necessarily carried with it a point of view. *See Miami Herald*, 418 U.S. at 256. *Miami Herald* involved a requirement that newspapers grant a "right-to-reply" to an editorial viewpoint printed in the newspaper. Where a newspaper makes the decision to print an editorial on a certain political viewpoint, requiring the paper to print the opposing view amounts to compelling the expression of a point of view at odds with view the editor chose to express. *See id.* at 257-58 (stating also that the right-to-reply statute would chill newspaper editors' speech by deterring them from speaking in unfavorable terms about a political candidate). The newspaper's situation is distinguishable from the situation here. Congress' grant of a copyright license that includes the requirement that local stations within a DMA be carried along with satellite carriers' premium programming does not implicate any point of view. SHVIA's must-carry provisions require the

broadcast of speech based solely on the geographic location of a station within a particular media market, without regard to the messages or viewpoints conveyed in the station's programming. *Cf. Turner I*, 512 U.S. at 645 (holding that cable's must-carry provisions distinguished between speakers, but where the provisions distinguished only upon the manner in which the speakers transmitted their messages, the provisions did not distinguish on the basis of the messages the speakers carried). Moreover, the must-carry provisions of SHVIA do not prescribe which local broadcast stations a satellite carrier may retransmit. The carrier opts to invoke the SHVIA license and to carry local stations in a particular market. *See* H.R. REP. No. 106-464, at 101 (stating that SHVIA allows carriers to choose whether to incur the must-carry obligation in a particular market). Therefore, using *Turner I's* language, Congress' preference for local "speakers" as expressed in SHVIA is unrelated to "what the favored speakers have to say." 512 U.S. at 658. SHVIA's facial neutrality weighs against a strict scrutiny analysis of SHVIA's must-carry provisions. However, the determination that the must-carry provisions, on their face, do not burden or benefit speech based on content does not end the inquiry; it is also necessary to determine whether the must-carry regulations are content-based in their purpose. *See id.* at 643

SHVIA's must-carry provisions are not content-based by their purpose. Both the House and Senate have stated numerous times and in numerous ways that the purposes behind SHVIA are to promote competition in television and to protect customers from rate increases, *see* H.R. REP. No. 106-79 (Part I), at 11 (1999); S. REP. No. 106-51 at 2

(1999), to promote healthy competition in industry, *see id.*; H.R. REP. No. 106-464, at 93-94 (stating SHVIA would eliminate any competitive disadvantage of satellite carriers, while creating parity and enhanced competition between satellite and cable television in the provision of local television broadcast stations), and to maintain free over-the-air television, *see* H.R. REP. No. 106-464, at 101. Without the limitations on the use of copyrighted works and the retransmission of local stations, Congress feared that satellite carriers' market share would increase, and local broadcasters would be prevented from reaching local viewers. These are not viewpoint-related concerns.

Plaintiffs argue that Congress imposed the must-carry conditions of § 338 in order to manipulate the editorial decisions and policies of satellite carriers. As support, Plaintiffs cite the House of Representatives Report: "The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and a few other signals." H.R. REP. No. 106-464, at 101. However, a mere incidental effect on the carriers' editorial decisions does not amount to content-based regulation of speech. The Supreme Court has noted that the principal inquiry in determining whether legislation is content neutral is to examine "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner I*, 512 U.S. at 642 (alteration in original). There has been no indication or offer of evidence that network affiliates carry a certain kind of speech, or that local stations carry a certain kind of speech. Therefore, Congress' intent to ensure that local stations are retransmitted by satellite carriers is not based

on the content of speech. Congress seeks to ensure that local stations are retransmitted, *regardless of the content of the station*. An intent to provide consumers with more than just network affiliates, to ensure competition between cable and satellite, and to ensure access to free television programming is unrelated to the content of the channels that Congress wants the satellite carriers to retransmit. *See id.* at 647 (holding that the overriding congressional purpose of ensuring that every individual has access to free television programming was unrelated to the content of expression disseminated by cable and broadcast speakers, where must-carry rules ensured that broadcast television stations would retain a large enough potential audience to earn necessary advertising revenue, or sufficient viewer contributions, to maintain their continued operation). Thus, SHVIA's manifest purpose is not "to regulate speech because of the message it conveys." *Id.* at 642. Therefore, SHVIA's purpose is content-neutral. *See id.* Accordingly, the must-carry provisions are not subject to strict scrutiny. *See id.* at 662 (concluding that must-carry provisions that were neutral on their face and in their purpose were subject to intermediate scrutiny).

2. Rational Basis Test Does Not Apply

Intervenor Defendants argue that the Court should review SHVIA using rational basis scrutiny, not intermediate scrutiny; but rational basis scrutiny is not the appropriate analytical scheme under which to review SHVIA's must-carry provisions. The Supreme Court has already held that provisions such as those at issue here

regulate speech. *See Turner I*, 512 U.S. at 638-39. Therefore, a heightened standard of scrutiny is most appropriate. *See id.* at 640-41. Moreover, the Supreme Court expressly rejected the application of the rational basis test to this context. *See id.* The *Turner I* Court held that the scarcity rationale which made the rational basis test appropriate in *Red Lion*, 395 U.S. at 388, did not apply to media that did not suffer the inherent limitations that characterize the broadcast medium (e.g., cable). *See id.* at 639. The Court further held that the physical characteristics of cable do not require the alteration of settled principles of First Amendment jurisprudence. *See id.* Therefore, the Court held that the heightened standard of intermediate scrutiny was more appropriate than rational basis scrutiny to review cable's must-carry rules. This Court notes that numerous courts have questioned and/or declined to extend the *Red Lion* rationale. *See, e.g., In re Complaint of Syracuse Peace Council against Television Station WTVH*, 2 F.C.C.R. 5043 (1987), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989); *Chesapeake & Potomac Tel.*, 42 F.3d at 190, *vacated* on *grounds of mootness*, 516 U.S. 415 (1996); *Turner I*, 512 U.S. at 637-40. *But see Time Warner Entertainment v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) (holding that satellite technology is subject to similar limitations as traditional broadcast media and should be analyzed under the same relaxed standard of scrutiny applied to traditional broadcast). In fact, in a decision involving traditional broadcasters subsequent to *Red Lion*, the Supreme Court applied intermediate scrutiny. *See League of Women Voters*, 468 U.S. at 380. In *League of Women Voters*, the Supreme Court referred to and recapped its decision in *Red Lion*, reasserted its belief that

"the broadcast industry operates under restraints not imposed upon other media," then held that the regulations at issue would only be upheld if they survived *intermediate* scrutiny. *See id.*, 468 U.S. at 380 (stating that regulations upon broadcasters had only been upheld when the restrictions were narrowly tailored to further a substantial government interest) (citing, *inter alia*, *Red Lion*, 395 U.S. at 377).

Intervenor-Defendants argue that the *Red Lion* rational basis test is appropriate here because, like traditional broadcasting, satellite transmission is subject to physical limitations. However, there is no evidence before the Court to support Intervenor-Defendants' assertion. Noting the lack of factual development of this point, Plaintiffs have emphasized that their challenge to the must-carry provisions is a facial challenge, not an as-applied challenge.[6] (Pl. Opp'n to Mot. to Dismiss at 3.) Therefore, this Court holds that rational basis analysis is not appropriate here, and, instead, analyzes the satellite must-carry provisions using intermediate scrutiny.

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[6] Plaintiffs previously placed a motion for summary judgment before the Court, arguing that SHVIA's must-carry provisions infringed Plaintiffs First Amendment rights in light of satellite's limited channel capacity. Plaintiffs asserted that the must-carry provisions would narrow satellite carriers' speech choices because the majority of carriers "speech" space would be commanded by local television stations. However, Plaintiffs have withdrawn this argument and have asserted only facial unconstitutionality in their opposition to Defendants' motions to dismiss.

D. SHVIA's Must-Carry Survives Intermediate Scrutiny

Regulations that are content-neutral but place an incidental burden on speech are subject to intermediate scrutiny. *See O'Brien*, 391 U.S. at 377. SHVIA's must-carry provisions do not violate the First Amendment because they satisfy every part of the intermediate scrutiny test. Under the intermediate scrutiny test, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377). The four-part test for intermediate scrutiny provides that a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interests that the regulation further are unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interests. *See O'Brien*, 391 U.S. at 377. A regulation need not be the least speech-restrictive means of advancing the Government's interest to satisfy the intermediate scrutiny standard. *See Turner I*, 512 U.S. at 662 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

1. Congressional Authority

Plaintiffs argue that Congress exceeds its enumerated powers when it conditions the use of a statutory copyright license on the display of copyrighted works carried

on local stations. This Court holds that Congress has acted well within its powers under the Copyright Clause of the United States Constitution in promulgating the limited license under SHVIA. *See* U.S. CONST., art. I, § 8, cl. 8. The Copyright Clause states that "Congress shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* In large part, Plaintiffs take issue with the existence of the copyright laws themselves. (Pl. Opp. at 11, 21-24.) In essence, Plaintiffs argue that it is wrong of Congress to impose restrictions on the ability of broadcasters to "retransmit any broadcast programming in any market without anyone's permission," and then condition lifting those restrictions on satellite carriers' willingness to support the public policy of providing a multiplicity of voices and exposure to viewers. (*Id.*) However, Congress has the power to use copyright, *or exceptions thereto,* to promote particular types of work, or works by particular authors, in preference to other types of works or authors. *See Goldstein,* 412 U.S. at 562 (stating that Congress has discretion to decide what types of works are to be covered by the federal statutory scheme); *Sony,* 464 U.S. at 429 (stating that Congress has discretion to decide the scope of an author or inventor's copyright protection). "[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Id.* The Supreme Court has held that Congress' regulatory decisions that address public policy interests in the realm of copyright are entitled to substantial deference. *See id.*

at 431 (stating that policy and history supports the Supreme Court's consistent deference to Congress when major technological innovations alter the market for copyrighted materials). Moreover, in considering the interests of authors and inventors, Congress may also consider issues of commerce. *See id.* at 429; *Goldstein*, 412 U.S. at 562. Congress' stated intent in creating the SHVIA license is to (1) "promote competition in the marketplace for delivery of multichannel video programming . . . to reduce costs to consumers;" (2) "protect[ ] and foster[ ] the system of television networks by encourag[ing] and promot[ing] retransmissions by satellite of local broadcast stations to subscribers who reside in the local markets of those stations;" (3) "preserve free television for those not served by satellite and cable systems;" and (4) "promote the widespread dissemination of information from a multiplicity of sources." H.R. REP. No. 106-464 at 91-92, 101. These goals are within Congress' authority recognized by the United States Supreme Court. *See Sony*, 464 U.S. at 429; *Goldstein*, 412 U.S. at 562. Therefore, Plaintiffs' argument that it is unconstitutional for Congress to make exceptions to its copyright protections under certain circumstances fails.

The satellite must-carry provisions are a prime example of an exception to copyright that is used to promote the works of potentially unrecognized copyright owners. The majority of stations obtain revenues through advertising. In turn, stations compensate copyright owners who provide programming to the stations. The wider the viewer base, the more revenues in advertising a station may receive. Therefore, popular shows (e.g., "Dateline," "Friends," or "Oprah") can make more money from

advertisements purchased to run during their breaks than unpopular shows. Consequently, stations may not elect to broadcast less popular shows, or programs that interest only a small audience (e.g., a local audience). By permitting all local stations in a particular market to be retransmitted, Congress enables copyrighted works displayed on non-network affiliates to be promoted, in addition to those on network affiliates. Thereby, copyright owners who display their work on local stations have an opportunity to receive compensation for their work, and, at the same time, to provide a diversity of views out of "mainstream" popularity. *See* H.R. REP. No. 106-464, at 101 (stating that a purpose of SHVIA is to satisfy the strong public interest in providing viewers with information from a variety of sources); H.R. REP. No. 106-6, at 4 (1999) (stating that local television stations need advertising revenue to continue to broadcast the public affairs and news programming for people in their communities). The SHVIA § 122 license and § 338 must-carry provisions further these goals. Therefore, Congress has acted within its authority in promulgating SHVIA.

2. Important Governmental Interest

The Supreme Court has held that the same interests that form the basis for SHVIA are "important governmental interests." *See Turner I*, 512 U.S. at 663; *Turner II*, 520 U.S. at 189. In promulgating the cable's must-carry provisions, Congress declared that the provisions served three interrelated interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in

the market for television programing." *See Turner I*, 512 U.S. at 662 (citing S. REP. No. 102-92, at 58 (1991); H.R. REP. No. 102-628, at 63 (1992), U.S. CODE CONG. & ADMIN. NEWS 1992, at 1191; 1992 Cable Act §§ 2(a)(8), (9), (10)). As indicated above, these are the same interests Congress articulated as the basis for the SHVIA must-carry provisions. *See infra* section III.C.1. The Supreme Court has held that these are substantial and legitimate interests. *See Turner I*, 512 U.S. at 662-63 (citations omitted). Individuals must retain access to local broadcast media. Local broadcast stations provide a source of information and an outlet for the exchange of matters of local concern. *See id.* at 663. Satellite carriers' decisions not to broadcast particular local stations can result in decreased advertising revenues for those stations. Consequently, those stations may be unable to sustain their business and might cease to broadcast. Protecting non-satellite households from loss of regular television broadcasting is an important federal interest. *See id.* (citing *Capital Cities Cable*, 467 U.S. at 714 (stating as much in relation to the potential effects of cable)). In addition, local stations provide a wide range of voices. The Supreme Court has held that "assuring that the public has access to multiplicity of information sources is a governmental purpose of the highest order . . . ; the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* (citations and internal quotations omitted). As to promoting fair competition, the Court has held that eliminating restraints on competition is always a substantial interest. *See id.* at 664. This is the case even where, as here, the entities subject to regulation are engaged in expressive activity protected by the

First Amendment. *See id.* (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)). Thus, all of the interests that SHVIA is meant to further are substantial and important interests for purposes of the intermediate scrutiny test.

Plaintiffs argue that the interests articulated above cannot support a finding that SHVIA's must-carry provisions are constitutional because these interests are different from those forming the basis of the Copyright Act. The Copyright Act's purpose is to encourage creative freedoms, while the must-carry provisions seek to create fair competition. Plaintiffs' arguments miss the mark. The Copyright Act, and SHVIA's § 122 license creating an exception to the Copyright Act's effects, need not be based on identical interests. The key inquiry is whether Congress has a substantial interest in creating the exception to the Copyright Act. As detailed above, Congress does have substantial and important interests in creating the § 122 license. Moreover, these interests are related to Congress' Copyright power, because fair competition encourages creative freedom. Television writers and producers need a variety of outlets for their broadcast works. Local television, and public and educational television outlets are vital sources for the wide dissemination of creative works. National networks and premium cable channels form additional outlets for television writers and producers. SHVIA's license advances television writers and producers' creative freedoms by affording these artists' works wider dissemination over multiple broadcast avenues.

3. Interests Unrelated to Free Expression

Under the *O'Brien* intermediate scrutiny test, a governmental interest that a regulation seeks to further must not only be substantial, it must also be "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. As indicated in the discussion of the basis of SHVIA's must-carry provisions, *see infra* section III.C.1., SHVIA's must-carry regulations are neither view-point oriented on their face or in their purpose. Moreover, the Supreme Court has held that the important governmental interests articulated above are unrelated to the suppression of free expression or the content of any speakers' messages. *See Turner I*, 512 U.S. at 663 (citations omitted).

4. Sufficiently Narrowly Tailored

A determination that SHVIA seeks to further substantial government interests is not sufficient if SHVIA places an incidental restriction on alleged First Amendment freedoms greater than is essential to the furtherance of those interests. *See O'Brien*, 391 U.S. at 377. The question of whether must-carry provisions unduly burden an entity that retransmits television stations was left open in *Turner I*, but resolved in *Turner II*. *See Turner I*, 512 U.S. at 664-65 (stating that, on the record before that Court, the Court was unable to conclude whether the Government had satisfied its burden that the cable must-carry provisions did not burden substantially more speech than necessary to further the government's legitimate interests); *Turner II*, 520 U.S. at 216-17 (holding that the evidence demonstrated that cable's must-carry provisions were narrowly tailored to achieve the ends for which they were

intended). This Court finds that SHVIA's must-carry obligations are even less burdensome than the cable must-carry obligations upheld in *Turner II*. Therefore, the SHVIA obligations are not overly burdensome on satellite carriers.

The must-carry limitations on a satellite carrier's receipt of the valuable, discretionary license does not unduly burden the carrier's First Amendment rights because the viewpoints expressed by a carrier remain within the carrier's control. First, given satellite's role as a conduit for broadcast signals, there is little risk that satellite viewers would assume that the stations carried on a satellite system convey the ideas or messages endorsed by the satellite carrier. *See Turner I*, 512 U.S. at 655 (stating the same about cable operators). Second, the must-carry provisions of SHVIA are less restrictive than the cable must-carry provisions because they do not mandate that satellite carriers carry a prescribed number of cable stations, *see* 47 U.S.C. § 338(a) (conditioning must-carry obligations on carrier's choice to employ § 122 license in a particular DMA), or that carriers broadcast stations on specific numeric channels, *see* 47 U.S.C. § 338(d) (stating that satellite carriers need not provide signal of local station on any particular channel number or in any particular order). *Cf.* 1992 Cable Act §§ 4, 5, 47 U.S.C. §§ 534(b)(1), (h)(1). In addition, unlike cable operators, satellite carriers are given the option of which local stations they will broadcast. Use of the § 122 license is voluntary, so a carrier need only expose itself to carriage of all local stations in the carrier's markets of choice. Through these limitations on the scope of satellite's must-carry provisions, it is apparent that "Congress took steps

to confine the breadth and burden of the regulatory scheme." *Turner II*, 520 U.S. at 216 (finding that Congress confined the burden of cable's must-carry schema-which had fewer limitations than the satellite schema at issue here). Therefore, SHVIA's must-carry provisions are narrowly tailored to perform Congress' goals. *See id.* at 215-16.

Notwithstanding the voluntary nature of the SHVIA license, Plaintiffs argue that the must-carry obligations are overly burdensome because carriers must sacrifice their editorial discretion. "[T]he doctrine of unconstitutional conditions limits the government's ability to make [carriers] surrender constitutional rights even to obtain an advantage that could otherwise be withheld." *Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1315 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). The copyright laws prohibit carriers from broadcasting copyrighted works without the permission of copyright owners. Through SHVIA, a carrier gains the advantage of unrestricted broadcasting of copyrighted works. Thus, the SHVIA license amounts to an opportunity to obtain an advantage that could otherwise be withheld. However, obtaining this advantage is not contingent upon the surrender of First Amendment rights. As indicated above, neither on its face nor by its purpose does the statute prefer one viewpoint over another. *See* 47 U.S.C. § 338. Therefore, satellite carriers' choice of speech is not unduly affected by § 338's must-carry provision.

Furthermore, editorial discretion is preserved because it is an individual satellite carrier, not Congress, that decides whether the carrier will take advantage of

the § 122 license, or opt to negotiate with individual owners of copyrighted works:

> Rather than require carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license. . . . Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress.

H.R. REP. No. 106-464, at 101. Although Plaintiffs argue that it is "wholly impractical" to negotiate individually with the holder of every copyrighted work aired by a local station, (Pl. Opp. at 12), it is not impossible to negotiate individually. Plaintiffs may exercise the full range of their editorial discretion by opting not to take advantage of the § 122 license. Plaintiffs' choice to conform to "the broadcast industry's business practices" and avoid negotiating individually for copyright retransmission rights is Plaintiffs' business decision. (*Id.* at 12 n.4.) Therefore, foregoing the benefits of the § 122 license in the interest of their editorial discretion is not, as Plaintiffs describe, "a choice between exercising First Amendment rights and obtaining the benefit," *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999) (holding that although government is not obligated to provide various benefits, it may not deny

them if reason for denial is the choice between exercising First Amendment rights and obtaining the benefits), instead, it is a choice between the benefit and an unpreferred business practice. The Government does not violate the First Amendment by offering Plaintiffs such a choice. *See Rust*, 500 U.S. at 199 n.5 (stating that the Government does not violate the First Amendment by offering a potential recipient of a benefit (i.e., a subsidy) the choice between accepting the benefit and the force of its regulations, and declining the benefit). For these reasons, SHVIA is sufficiently narrowly tailored to be constitutional.

E. Congress has not Exceeded Authority

SHVIA creates a license, not a subsidy. Although Congress conceived of the SHVIA license as "a matter of legislative grace, in the nature of subsidies to satellite carriers," H.R. REP. No. 106-464, at 101, the SHVIA license is not a subsidy. The parties engage in an extensive debate about whether the license granted by § 122 is a subsidy. Defendants argue that a satellite carriers' license to broadcast copyrighted works without obtaining permission from the owners of the copyrighted works is a benefit upon which Congress can place conditions. Plaintiffs argue that the SHVIA license is not a subsidy because subsidies are an exercise of Congress' spending power, not its regulatory power. Plaintiffs argue further that, through SHVIA, Congress is regulating inappropriately to favor one type of speech over another. The Court finds that language used to define and describe a "subsidy" makes clear that the SHVIA license does not

qualify. Legal and lay dictionaries define a subsidy as "a grant of money:"

> **Subsidy.** A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public.

BLACK'S LAW DICTIONARY 1428 (6th ed. 1990); *see also* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1306 (2000) (defining "subsidy" as: "1. a direct financial aid furnished by a government, as to a private commercial enterprise, an individual, or another government. 2. any grant or contribution of money"); THE AMERICAN HERITAGE DICTIONARY 1213 (2d College ed. 1991) (defining "subsidy" as: "1. Monetary assistance granted by a government to a person or a private commercial enterprise. 2. Financial assistance. . . . "). In addition, Government subsidies come under the heading "Appropriation Accounting" and refer to sums "payable" in the United States Code. *See* 31 U.S.C.A. § 1501(a)(5) (1983) and accompanying Notes.

Section 122 of SHVIA does not grant a "subsidy" because it does not entail the grant of government funds, or other benefits obtained through the use of government funds (i.e., property, government-created jobs, etc.), to confer a benefit. *See* 17 U.S.C. § 122. Subsection 122(c) provides that satellite carriers regulated under § 122 do not have to pay royalty fees to copyright owners, but if this is considered a grant of money (i.e., by way of a payment exemption), the money savings are derived from the copyright owners, not from the Government. Absent § 122(c), satellite carriers would have to pay copyright

owners to retransmit copyrighted works, not pay the Government. *See id.* (setting "limitations on [a copyright owner's] exclusive rights"). Therefore, because § 122 does not amount to a benefit conferred through the expenditure of government funds, § 122 is not accurately characterized as a subsidy.

Section 122 is most accurately characterized as a license. A license is defined as "[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass, a tort, or otherwise not allowable." BLACK'S LAW DICTIONARY 920. Section 122 grants a license because, without its provisions, a satellite carrier would not be permitted to retransmit copyrighted works without gaining permission from copyright owners or paying royalties. The Copyright Act would prohibit such transmission. Defendants treat the SHVIA benefit like a subsidy because § 122 grants a benefit that satellite carriers would not have otherwise, just as a subsidy does. However, licenses perform the same purpose. In addition, both can serve to increase competition by giving the entities in receipt of the subsidies or licenses an ability to challenge another force in the market (e.g., cable systems). Yet, simply because both subsidies and licenses enure a benefit does not mean they are one and the same.

Congress cannot make the receipt of a valuable government license contingent upon the recipient's surrender of its First Amendment rights. *See Chesapeake & Potomac Tel.*, 42 F.3d at 185, 192. If § 122 were a subsidy, Congress could favor one message over another, because the Government is entitled to expend funds on certain programs

and not on others in order to promote particular messages and interests. *See, e.g., Rosenberger,* 515 U.S. at 834; *Rust,* 500 U.S. at 196. However, Congress may not use its regulatory powers to influence or penalize speech. *See Miami Herald,* 418 U.S. at 256-58 (holding that a right to reply statute improperly influenced a newspaper's speech); *Pacific Gas & Elec.,* 475 U.S. at 16 (holding that requirement that utility company include a consumer group's critical newsletter in its customer bills improperly influenced speech); *American Communications Ass'n, C.I.O. v. Douds,* 339 U.S. 382, 402 (1950) (holding that speech-contingent withdrawal of opportunity to invoke the facilities of the National Labor Relations Board improperly abridged speech); *see also Speiser,* 357 U.S. at 518 (holding that use of taxing power to deny a tax exemption for engaging in particular speech was an impermissible limitation on free speech). The Supreme Court has held that although an entity has no right to a valuable governmental benefit, and though the government may deny a benefit for a number of reasons, an entity may not be denied a benefit on a basis that infringes its constitutionally protected interests, especially the interest in freedom of speech. *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972). Therefore, regulators creating licenses must observe the standard rule that government regulation may not favor one viewpoint over another. *See, e.g., Speiser,* 357 U.S. at 518; *Rosenberger,* 515 U.S. at 828. This Court holds that the Government did not exercise its regulatory powers improperly by making the § 122 license contingent upon satellite carriers carrying all local stations within a DMA.

The must-carry conditions on use of the § 122 license are not unconstitutional because, as explained in great detail above, the must-carry provisions do not infringe on satellite carriers' First Amendment rights. The SHVIA condition requiring carriers to carry all local stations in a DMA if the carrier chooses to carry one local station in a DMA is not based on the particular "speech" or "expression" of any local station. Therefore, in regulating through SHVIA, Congress is not attempting to influence or penalize speech. *Cf. Miami Herald*, 418 U.S. at 256-58; *Pacific Gas & Elec.*, 475 U.S. at 16; *Speiser*, 357 U.S. at 518.

Moreover, Congress cannot be said to "deny" a benefit on the basis of satellite carriers' speech choices because carriers are not required to take advantage of the § 122 license. If carriers choose not to invoke the copyright license created by § 122, they "remain free to carry any programming for which they are able to acquire the property rights." H.R. REP. No. 106-646, at 101. The need to obtain property rights or pay royalties to copyright owners on an individual basis absent utilization of the § 122 license does not violate the carriers' First Amendment rights, because there is no First Amendment right to make unrestricted commercial use of the copyrighted works of others. *See, e.g., Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 555-60 (1985) (indicating that restrictions created by copyright laws do not violate First Amendment); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75 (1977) (holding that the First Amendment does not entitle media to broadcast a performer's entire act without his consent); *United Video v. Fed. Communications Comm'n*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) ("In the present case, the petitioners desire to make commercial

use of the copyrighted works of others. There is no first amendment right to do so."). The statutory copyright license created by SHVIA makes it easier, and perhaps more affordable, for satellite carriers to broadcast copyrighted works, and thereby encourages carriers to take advantage of the license. The accompanying requirement to comply with the must-carry provisions then accomplishes the legislative goals of ensuring consumer access to free television, promoting competition, and providing for the broadcast of a range of viewpoints. Governmental encouragement of activity consonant with legislative policy does not violate the First Amendment. *See Finley*, 524 U.S. at 587-88. Therefore, Congress has not exceeded its authority in promulgating SHVIA.

F. Remaining Causes of Action

Aside from their First Amendment argument, Plaintiffs also argue that SHVIA's must-carry provisions effect a taking of their property, and that the must-carry provisions violate due process. Plaintiffs assert that § 338 grants local television broadcast stations an easement authorizing them to interconnect with, and permanently physically occupy, a portion of a satellite carrier's real property, facilities, and spectrum. (Compl. ¶ 10.) Plaintiffs contend that this "federally-mandated transfer of private property from one person to another, without substantial or legitimate public purpose," violates the Takings and Due Process Clauses of the Fifth Amendment. (*Id.* ¶¶ 10, 91-97, 100.) The Court rejects both of these arguments, but addresses both briefly.

1. SHVIA Does Not Effect a Taking

SHVIA does not effect a *per se* or a regulatory taking. A *per se* taking occurs when a regulation compels an actual physical invasion of one's property. *See Front Royal*, 135 F.3d at 285 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Such a physical invasion is considered a taking, no matter how slight the invasion or how weighty the public interest forming the basis of the regulation. *See id.* An occupation of another's property is a permanent physical occupation constituting a taking if the property owner has no right to possess or control the occupied space, has no power to exclude the occupier from the possession and use of the property, or the owner has its value in the property eliminated because the owner cannot sell the occupied property for valuable use to another. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982). SHVIA's must-carry regulations do not effect a *per se* taking because, first, satellite owners retain possession and control over their facilities and programming. As indicated above, the SHVIA license is voluntary and applies only on a market-by-market basis. Therefore, satellite carriers can always determine which local stations they will carry, if any at all. Second, for the same reasons, satellite carriers retain the ability to exclude local stations from possessing and using carriers' facilities. Finally, SHVIA does not render carriers' facilities and programming capabilities valueless. SHVIA need not have any effect on a carrier at all if the carrier does not take advantage of the § 122 statutory copyright license. Yet, if the carrier does take advantage of the license, the carrier's decision to do so is based on the carrier's determination that the license to broadcast

copyrighted works without paying royalties to individual copyright owners is more valuable than foregoing the license.

Also, SHVIA's must-carry provisions do not effect a regulatory taking. A regulatory taking occurs if regulations deny a property owner all economically beneficial or productive use of the property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980) (describing a regulatory taking of land). Courts examine three factors to determine whether a regulatory taking has occurred: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the governmental action. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (citation omitted). SHVIA does not effect a regulatory taking because, first, as explained above, the must-carry regulations need not have any economic impact. Any economic impact that the must-carry regulations have is decided by carriers on an individual basis, depending on whether they take advantage of the copyright license. Second, § 338 does not interfere with reasonable investment expectations because satellite carriers do not have a reasonable, investment-backed expectation that they will have unrestricted use of specific copyrighted works of others. Therefore, SHVIA does not effect a taking by making conditional a carrier's relief from the restrictions imposed by the copyright laws. Finally, § 338 does not permanently invade or appropriate a carriers' assets for governmental use. Consequently, the character of the SHVIA governmental action does not suggest a taking. For these reasons, the Court holds that SHVIA's must-

carry provisions do not effect a regulatory taking of Plaintiffs' property.

2. SHVIA Conforms with Due Process

Plaintiffs argue that the must-carry provisions of § 338 violate the Due Process Clause of the Fifth Amendment. However, the statute provides no factual basis for Plaintiffs' allegations. Plaintiffs must demonstrate three elements to plead a cognizable due process claim: (1) that the claimant possesses an interest in property, (2) that state action deprives the claimant of the property interest, and (3) that the state's action falls "so far beyond the outer limits of legitimate government action that no process could cure the deficiency." *Front Royal,* 135 F.3d at 288. Plaintiffs cannot state a claim for relief for violation of due process because they cannot demonstrate the second and third elements. As detailed above, the SHVIA must-carry provisions do not deprive satellite carriers of their property interest. *See infra* section III.F.1. Section 338 is voluntary and has the potential of expanding, not reducing, carriers' property interest. Through the SHVIA license and must-carry provisions, satellite carriers have the opportunity to broadcast a wide range of local television stations which otherwise they could not broadcast without paying royalties to individual copyright owners. *See* 17 U.S.C. § 122(a), (c); 47 U.S.C. § 338(a). Furthermore, Congress' action in promulgating § 338 does not exceed the limits of legitimate government action because Congress had substantial and important purposes in promulgating the must-carry provisions. *See infra* section III.D.1 (setting forth the interests that form the basis for SHVIA and citing H.R. REP. No. 106-464 at 91-92, 101);

III.D.2 (indicating that the Supreme Court found the same interests that form the basis of SHVIA to be important when they formed the basis of the cable must-carry provisions). As discussed in detail above, those Congressional goals are within the limits of legitimate government action. *See, e.g., Turner I,* 512 U.S. at 664; *Turner II,* 520 U.S. at 189-90. Therefore, the must-carry regulations do not violate the Due Process Clause of the Fifth Amendment.

V. CONCLUSION

Thus, for the reasons stated above, the Court finds that the Satellite Home Viewer Improvement Act of 1999 is constitutional and dismisses Plaintiffs' Complaint. SHVIA does not violate the First Amendment because it does not regulate impermissibly satellite carriers' speech, and it promotes free television and the wide dissemination of programming. Furthermore, there is no First Amendment violation because Congress has the authority to grant a copyright license to retransmit local television programs. In addition, SHVIA does not effect a Fifth Amendment "taking" because (1) SHVIA has the potential to expand the value of satellite carriers' property; (2) exposure to the must-carry obligations is voluntary; and (3) satellite carriers retain control over their property by deciding whether to accept a copyright license to retransmit local television stations and thereby incur the must-carry obligations in local markets. Finally, the must-carry regulations do not violate due process because Congress has acted within its authority in granting a copyright license with accompanying must-carry provisions, and the must-carry provisions do not strip the satellite carriers' property of its value.

Accordingly, for the reasons stated above, Defendants' motions to dismiss are GRANTED.

The Clerk is directed to forward a copy of this Memorandum Opinion to counsel of record.

Entered this 19th day of June, 2001.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/19/01

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 00-1571-A
FEDERAL COMMUNICATIONS COMMISSION, *et al.*, Defendants,	)	
and	)	
NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*, Defendant-Intervenors.	)	

ORDER

THIS MATTER is before the Court on the Motion to Dismiss filed by Defendants the Federal Communications Commission ("FCC"), the FCC's chairman (William E. Kennard), the FCC's Commissioners (Susan Ness, Harold Furchtgott-Roth, Michael K. Powell, and Gloria Tristani), the United States Copyright Office of the Library of Congress, the Librarian of the Library of Congress (James H. Billington), and the Registrar of Copyrights (Marybeth Peters),[1] and on the Motion to Dismiss filed by Intervenor-Defendants the Association of America's Public

[1] The individual Defendants are parties to this suit in their official capacities.

Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting.

This case involves satellite carriers' facial challenge to the constitutionality of the copyright license created by the Satellite Home Viewer Improvement Act of 1999 and the license's "must carry" provisions under the First and Fifth Amendments to the Constitution. In essence, the satellite carriers assert that the "must carry" provisions of the new copyright license infringe upon carriers' First Amendment right to control program content and effect a "taking" of property in violation of the Fifth Amendment because the carriers are required to carry certain stations in a given market if the carriers want to take advantage of the copyright license in that market.

The specific issues before the Court are whether Plaintiffs have pled a cause of action that (1) the Satellite Home Viewer Improvement Act of 1999 ("SHVIA" or "Act"), on its face, violates satellite carriers' First Amendment rights; (2) Congress has exceeded its authority in promulgating SHVIA; (3) SHVIA effects a taking of satellite carriers' private property without just compensation in violation of the Fifth Amendment Takings Clause; and (4) SHVIA deprives satellite carriers of their property without due process in violation of the Fifth Amendment Due Process Clause.

For the reasons set forth in the accompanying Memorandum Opinion, the Court holds that the SHVIA is constitutional and does not in any way violate the First and Fifth Amendment rights of satellite carriers. Moreover, the Act is a proper exercise of Congress' plenary powers over copyright and Congress' power to promote

the free and full exchange of information over the broadcast spectrum. In considering the satellite carriers' First Amendment claims, the Court holds first that SHVIA is subject to review using intermediate scrutiny. Next, the Court finds that the must-carry provisions do not violate Plaintiffs' First Amendment rights because (1) neither the provisions' language nor their purpose are content-based; (2) the provisions are within the authority granted to the Government under the Copyright Clause; (3) the must-carry provisions further important governmental interests that are unrelated to the suppression of free expression; and (4) any incidental restriction on satellite carriers' First Amendment freedoms is no greater than necessary to further the Government's interests. With respect to the satellite carriers' Fifth Amendment claims, the Court holds that SHVIA does not effect a taking of satellite carriers' property because the carriers may choose to accept or decline a free copyright license to restransmit the local programs of any given market. Satellite carriers decide whether to incur the must-carry obligations because the obligations travel with the optional copyright license into various markets. Moreover, SHVIA's copyright license has the potential to expand the value of satellite carriers' property. Finally, the Court holds that the must-carry regulations do not violate due process because Congress has acted within its authority in promulgating the must-carry provisions, and the regulations do not strip satellite carriers' property of all of its value.

For these reasons, the Court does not sustain the satellite carriers' constitutional objections to SHVIA. Accordingly, it is hereby

ORDERED that Defendants' motions to dismiss are GRANTED.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 19th day of June, 2001.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/19/01

Supreme Court, U.S.
FILED
MAY 13 2002
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No. 01-1332

In the Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, Div. B, 113 Stat. 1501A-523, creates a statutory copyright license that gives satellite carriers the option to make secondary transmissions of local television broadcasts, without securing the permission of copyright holders, in local markets of the carriers' choosing. 17 U.S.C. 122 (Supp. V 1999). If a satellite carrier invokes that statutory copyright license with respect to any broadcast station in a particular local broadcast market, it must, upon request, carry the signals of all broadcast stations in that local market. 47 U.S.C. 338 (Supp. V 1999).

The question presented is whether the requirement that a satellite carrier that invokes the statutory copyright license to retransmit copyrighted broadcasts in a local market must, upon request, carry the signals of all broadcast stations in that local market violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 275 F.3d 337. The opinion of the district court (Pet. App. 75a-129a) is reported at 146 F. Supp. 2d 803.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2001. The petition for a writ of certiorari was filed on March 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Satellite Home Viewer Improvement Act of 1999 (SHVIA or the Act), Pub. L. No. 106-113, Div. B, 113 Stat. 1501A-523, created a statutory copyright license for the benefit of satellite carriers, which they may exercise at their option. Petitioners, who are satellite carriers, are dissatisfied with the terms of that optional statutory license and, by invoking the First Amendment, seek to expand those terms by avoiding conditions placed on the exercise of the license by Congress.

In the SHVIA, Congress sought to promote competition between satellite carriers and the cable television industry, while taking care not to undermine the goals of the related statutory scheme that regulates cable operators and also minimizing the potentially disruptive effect of satellite carriage on local television broadcasting markets. The Act creates a statutory copyright license that allows satellite carriers to make secondary transmissions of local television broadcasts in markets of the carriers' choosing, without securing the authorization of individual copyright owners of the broadcasts or paying royalties to those copyright owners. In enacting this new license, however, Congress did not allow satellite carriers to choose individual local stations for rebroadcast. Rather, under the SHVIA, if a satellite provider chooses to invoke the statutory license with respect to a particular local market, it must carry, upon request, all local stations in that market. See 17 U.S.C. 122(a) (Supp. V 1999).

b. The SHVIA was enacted against a regulatory background in which satellite carriers had no right to retransmit local television channels into their local markets without obtaining the consent of copyright

owners. Under generally applicable copyright laws, a party seeking to retransmit broadcast television programming must obtain authorization from each owner of a copyright in the various television programs included in the broadcast. See 17 U.S.C. 106(4) and (5) (1994 & Supp. V 1999). Congress has carved out exceptions to the general prohibition on retransmitting copyrighted programs, however, when it has concluded that such exceptions are justified by the public interest in broad dissemination of video programming and when securing authorization of or paying royalties to copyright owners would be impracticable. These exceptions, referred to as compulsory or statutory licenses, permit carriers in specified circumstances to retransmit broadcast signals without obtaining consent from the copyright owners.

In the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (17 U.S.C. 101 *et seq.*), Congress granted such a statutory license to cable television systems, which allowed cable operators to retransmit local broadcast television signals. See 17 U.S.C. 111(c) (1994 & Supp. V 1999). Cable operators may not, however, choose to transmit only certain local stations. Rather, cable operators have long been required—first by regulations of the Federal Communications Commission (FCC or Commission) predating the Copyright Act of 1976, and later by federal statute, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (47 U.S.C. 521 *et seq.*)—to carry any local broadcast signal located in an area served by the cable system. 47 U.S.C. 534(b)(1)(B) and (h)(1)(A) (Supp. V 1999); see Pet. App. 12a-14a. The statutory "must-carry" obligation reflects Congress's concern that, if cable operators refused to carry the full variety of local broadcast channels,

viewers would be deprived of multiple sources of free broadcast programming. This Court upheld that statutory "must-carry" obligation imposed on cable operators in *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*).

c. In 1997 and 1998, Congress conducted an extensive review of the Copyright Act's statutory licensing provisions and their impact on the cable, satellite, and over-the-air broadcast industries. The satellite industry urged Congress to grant satellite carriers a statutory license that would enable them to compete more effectively with cable operators by allowing them to offer broadcast stations to subscribers in those stations' local markets. See *Copyright Licensing Regimes Covering Retransmission of Broadcast Signals: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on Judiciary*, 105th Cong., 1st Sess. 42 (1997). Representatives of the cable industry argued that, to ensure equal treatment between cable and satellite, satellite carriers should be subject to carriage obligations similar to those imposed on cable operators by the cable must-carry law upheld in *Turner II*. See *id.* at 82. Representatives of the broadcast industry expressed concern that selective retransmission of television broadcasts by satellite carriers would undermine the objective of the cable must-carry law that local stations should be able to compete for viewers on an equal footing, and argued that satellite carriers should not be empowered to pick winners and losers in individual local broadcast markets. *Id.* at 154.

In enacting the SHVIA, Congress sought to balance those competing concerns. Congress granted satellite carriers a statutory copyright license that a carrier may invoke, free of obligation to pay royalties, for any

particular local market of its choosing. See 17 U.S.C. 122(a) and (c) (Supp. V 1999). (Satellite carriers also remain free, as before, to obtain the authorization of copyright owners of broadcast programming for retransmission, through the operation of the traditional copyright system.) Congress did not, however, impose on satellite carriers a "must-carry" obligation identical to the obligation imposed on cable operators. Rather, Congress structured the statutory copyright license in a manner intended to prevent satellite carriers from disrupting competition in local broadcast markets. Instead of granting satellite carriers a station-by-station license, which would have allowed satellite carriers to choose to carry only certain broadcast stations in a local market, Congress created a market-by-market license. Thus, if the satellite carrier chooses to invoke the statutory copyright license for a particular market, it must carry all local broadcast stations in that market that request carriage. See 47 U.S.C. 338(a)(1) (Supp. V 1999).[1]

The Conference Report accompanying the SHVIA explains that the terms of satellite carriers' statutory copyright license reflect three guiding principles. First, Congress sought to promote competition between the cable and satellite industries by allowing satellite companies to carry local broadcast stations, as cable operators had long been allowed to do. Second, Congress intended not to interfere with traditional network broadcasting practices that foster local affiliates. Third,

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[1] A carrier is not, however, required to carry a local commercial broadcast station if the signal would substantially duplicate the signal of another local commercial station, and is also not required to carry more than one network affiliate in a particular market, unless the two affiliates are licensed to communities in different States. See 47 U.S.C. 338(c)(1) (Supp. V 1999).

Congress wished to minimize disruption of existing local broadcast markets. See H.R. Conf. Rep. No. 464, 106th Cong., 1st Sess. 92 (1999).

Congress was especially concerned that a grant of a compulsory license to satellite carriers might inadvertently undermine the diverse local markets in free broadcast television that had been carefully fostered by the regulatory regimes governing the broadcast and cable industries. See H.R. Conf. Rep. No. 464, *supra*, at 101. By providing a statutory license only "on a market-by-market basis," Congress intended to prevent satellite carriers from using the license "to carry only certain stations and effectively preventing many other local broadcasters from reaching" their potential audience. *Ibid.* Congress feared that a different kind of statutory license, allowing satellite companies to carry only particular broadcast stations within a local market, would have undermined the government's longstanding interest in maintaining a broad and diverse array of options in free over-the-air television. Congress noted that, as the attractiveness of satellite service increased (by offering broadcast stations including network affiliates' signals, to local customers), satellite subscribers would be less likely also to install or maintain antennas to receive over-the-air broadcasts. See *id.* at 101-102.

2. On September 20, 2000, petitioners filed suit in district court, alleging (among other things) that the terms of the statutory copyright license granted to satellite carriers by the SHVIA infringed the carriers' First Amendment rights. On November 30, 2000, while the district court action was proceeding, the FCC adopted regulations implementing the carriage obligations that a direct broadcast satellite provider triggers by electing to carry local stations in a particular designated market area via the statutory copyright license.

Following publication of the Commission's order, petitioners filed petitions for review in the court of appeals, also raising First Amendment contentions. On June 19, 2001, the district court rejected petitioners' constitutional challenges and dismissed their action. See Pet. App. 75a-129a. Petitioners pursued an appeal, which the court of appeals consolidated with the petition for review.

3. The court of appeals affirmed the dismissal of petitioners' constitutional challenge, and also denied their petition for review. See Pet. App. 1a-66a.[2]

a. The court first rejected petitioners' effort to cast the SHVIA as a content-based restriction on speech. See Pet. App. 27a-33a.[3] The court noted that the SHVIA does not impose any burden on a satellite carrier's retransmission of local broadcasts per se: a satellite company that rebroadcasts a local station pursuant to negotiated copyright clearances incurs no obligation under the SHVIA. See *id.* at 30a. The

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[2] The court of appeals also denied petitions for review of the FCC's order brought by representatives of the local broadcast industry, concerning the terms on which satellite carriers may offer local broadcast stations to subscribers. See Pet. App. 60a-65a. That issue is not directly relevant to the constitutional issues presented in the certiorari petition and will not be discussed further.

[3] The government had argued that, because a satellite carrier's obligation is triggered only by the carrier's voluntary decision to invoke the statutory copyright license (rather than to obtain authorization from copyright owners for retransmission), the "carry one, carry all" rule does not impose any burden on satellite carriers' speech and thus should be evaluated under the rational-basis test rather than a heightened level of First Amendment scrutiny. Because the court held that the SHVIA satisfies intermediate scrutiny, the court found it unnecessary to decide whether a lesser standard of scrutiny is appropriate. See Pet. App. 33a n.6.

carriage obligation arises only to the extent that a satellite carrier invokes the statutory copyright license for a particular market. See *ibid.* The distinction between carriers that make private arrangements and those that choose to take advantage of a favorable statutory alternative is, the court held, "content-neutral on its face." *Id.* at 31a. The court also ruled that Congress's determination to ensure that a statutory license would not disrupt the existing local broadcast market is a content-neutral purpose, and observed that this Court had come to the same conclusion when it upheld the cable must-carry law in *Turner II*. See *id.* at 31a-32a.

b. The court further ruled that the SHVIA satisfies intermediate scrutiny under the framework of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), pursuant to which a regulation will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See Pet. App. 33a-53a.

The court held that the SHVIA serves two distinct substantial governmental interests that are unrelated to the suppression of speech. First, Congress has a substantial interest in ensuring that the SHVIA statutory license does not undermine an important goal of the regulatory regime governing cable operators, namely, the preservation of a diverse array of free over-the-air local broadcast options for those who do not subscribe to pay services such as cable or satellite television. See Pet. App. 35a-48a. The court ruled that Congress had an ample basis to conclude that satellite carriers, strengthened by a statutory license, would capture a large share of television households, and that,

if the satellite companies were able to cherry-pick individual broadcast stations within markets for carriage, stations that were not carried would be injured by the loss of access to potential viewers. See *id.* at 38a-44a. The court rejected the carriers' arguments that, in determining whether broadcast stations' access to viewers could be impaired by the grant of a statutory license without a "carry one, carry all" requirement, Congress should have considered only the relatively small share of the television households that satellite carriers reached before obtaining the statutory license. Rather, the court made clear, Congress could "view the regulatory landscape as a whole by considering the cumulative effects [on broadcast stations] of cable and satellite." *Id.* at 47a-48a.

Second, the court held that Congress has a substantial interest in "preventing SHVIA's grant of a statutory copyright license to satellite carriers from undermining competition in local markets for broadcast television advertising." Pet. App. 48a-49a. A station-by-station license, under which stations not chosen for carriage would lose satellite customers as potential viewers, would have had a serious impact on the ability of independent stations and of emerging television networks to compete for local television advertising. See *id.* at 50a. "By choosing a market-by-market license, Congress acted to minimize the unintended, disruptive effects of its intervention in the television marketplace." *Id.* at 51a.

c. In light of the substantial interests furthered by the SHVIA, the court readily ruled that the "carry one, carry all" term of the copyright license satisfies the requirement of *O'Brien* that any restriction on speech be narrowly tailored. See Pet. App. 52a-53a. The court observed that the carriers had conceded that, absent

that rule, "they would have chosen to carry only major network affiliates in many local markets and would therefore have threatened independent broadcasters with the very harms that Congress sought to prevent." *Id.* at 52a. As the court explained, any statutory license without an attendant carriage requirement "would have been significantly less effective—indeed, it would have been completely ineffective—in advancing the government's interests." *Id.* at 53a.

ARGUMENT

The court of appeals correctly upheld the carriage obligations that are terms of the statutory copyright license granted to satellite carriers by the SHVIA. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The challenged provision of the SHVIA does not restrict petitioners' speech. To the contrary, the copyright license granted by the SHVIA enables satellite carriers to carry programming that they might not otherwise be able to carry, because of the operation of generally applicable principles of copyright law. It is copyright law, not the SHVIA, that prevents petitioners from utilizing the intellectual property of others without their consent. Petitioners do not challenge those underlying and generally applicable restrictions imposed by copyright law, and such a challenge would, in any event, be baseless. See *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985); *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989) (cable operators have no "first amendment right to express themselves using the copyrighted materials of others").

Petitioners argue that, as a practical matter, it is difficult or impossible to negotiate agreements with copyright holders. Pet. 22-24. But that quarrel is not with the SHVIA license—which is an enormously valuable and extraordinary benefit in the form of an exemption from generally applicable copyright laws, and which vastly expands petitioners' ability to carry broadcast stations. It is, instead, a quarrel with the limitations imposed by the copyright laws on petitioners' right to carry others' programming. The First Amendment does not, however, require that petitioners be granted any larger dispensation from the copyright laws than that provided by Congress in the SHVIA.

Rather than restricting speech, the SHVIA license allows satellite carriers to use the property of others without regard to background copyright restrictions. If petitioners do not wish to make use of the statutory license in any market because they are dissatisfied with the terms of that license, they remain free to negotiate the carriage of individual broadcast stations and to carry other programming as well, just as before passage of the SHVIA. The SHVIA thus "do[es] not produce any net decrease in the amount of available speech." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 647 (1994) (*Turner I*). There is therefore no basis for petitioners' alarmist assertion (Pet. 12) that the decision below "grants Congress a blank check to suppress speech whenever it concludes that the marketplace of ideas needs a larger or more diverse rostrum of speakers." The SHVIA license does not suppress anyone's speech; to the contrary, it promotes the broad dissemination of video programming by enabling satellite carriers to carry local broadcast signals without obtaining the ordinary copyright clearances.

At bottom, petitioners fundamentally misapprehend the nature of the license granted by 17 U.S.C. 122 (Supp. V 1999). Congress did not create an unrestricted statutory license to retransmit a single station in a given market and then attach restrictions on free expression as conditions to that new "right." Rather, the various requirements of Section 122 and of 47 U.S.C. 338 (Supp. V 1999), including the market-carriage provision, are essential terms of the license itself, which expands petitioners' opportunity to engage in speech. As the Conference Report explained, the SHVIA compulsory license is "available only on a market-by-market basis," H.R. Conf. Rep. No. 464, *supra*, at 100. But that license does not restrict petitioners' speech; it increases speech.

2. Petitioners contend (Pet. 21-25) that the SHVIA is content-based and therefore should be subject to strict scrutiny, rather than the intermediate scrutiny test of *O'Brien*. The court of appeals correctly ruled, however, that SHVIA is content-neutral. Pet. App. 29a-33a. That ruling is fully consistent with, and indeed follows from, this Court's decisions in *Turner I* and *Turner II*.

The central inquiry in determining whether a regulation is content-based is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner I*, 512 U.S. at 642. In *Turner I*, this Court held, in the cable context, that a requirement to carry all broadcast stations in a particular local market is content-neutral. See *id.* at 643 (recognizing that the cable "must-carry" rules "impose burdens and confer benefits without reference to the content of speech"). The SHVIA presents an *a fortiori* case: unlike the cable must-carry law (which was not fashioned as a

condition on the statutory copyright license afforded to cable operators but rather is a freestanding mandate), the satellite carriers are free to ignore the carriage obligations that are part of their statutory copyright license. See H.R. Conf. Rep. No. 464, *supra*, at 101 ("Rather than require carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license."). Unlike cable operators, satellite providers may choose whether they wish, in a particular market, to offer (1) only national programming, (2) national programming together with local broadcast programming for which the carrier has obtained the copyright holders' consent, or (3) national programming and all local broadcasts pursuant to the statutory license.

Petitioners argue (Pet. 21-22) that, unlike the cable must-carry law, the "carry one, carry all" rule for satellite carriers is content-based because the carriage obligation is triggered by a satellite carrier's decision to carry any local *station*, whereas the cable operator's obligation to carry local stations turns on the operator's decision to serve a particular *market*. To support that contention, petitioners seize on a single phrase in the *Turner I* decision (see Pet. 21), where the Court observed that the cable must-carry rules did not turn on "programs *or stations* the cable operator has selected or will select." 512 U.S. at 644 (emphasis added).

In that passage, however, the Court was explaining that the operation of the must-carry law did not turn on a cable operator's decision to carry any *particular* program or station. So too here, the SHVIA regime does not depend on the satellite carrier's choice of a *particular* program or station (or group of stations).

The carriage obligation comes into play when the satellite carrier exercises its statutory license with respect to any local broadcast station, be it one of the network affiliates, an independent commercial station, or a public broadcasting station. The content of the programming carried by the station that the carrier prefers is irrelevant to the operation of the "carry one, carry all" rule. Indeed, as the court of appeals observed, in a strict sense the rule turns not on the satellite carrier's decision to carry a broadcast station, but rather on its decision to do so using the statutory license—to transmit programming "by using one set of economic arrangements rather than another." Pet. App. 30a-31a; compare *Turner I*, 512 U.S. at 645 (holding that a distinction "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry" is content-neutral).[4]

Nor, contrary to petitioners' contention (Pet. 24-25), is SHVIA's purpose related to content. As we note above, Congress identified three purposes in enacting the SHVIA statutory license: (1) granting satellite carriers a statutory copyright license to enhance the satel-

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[4] Petitioners' attempt (Pet. 22) to analogize this case to *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is without merit. *Tornillo* invalidated a "right of reply" statute, which guaranteed a candidate for state election the right to reply in a newspaper whenever that newspaper made any attack on the candidate's personal character or charged the candidate with malfeasance in office. See *id.* at 244-245 n.2. The operation of the statute in *Tornillo* turned entirely on the content of the article previously run by the newspaper—namely, criticism of the candidate. See *id.* at 256 (noting that the statute "exact[ed] a penalty on the basis of * * * content"). The carriage obligations at issue here, however, "are not activated by any particular message spoken by [satellite carriers] and thus exact no content-based penalty." *Turner I*, 512 U.S. at 655 (distinguishing *Tornillo*).

lite industry's ability to compete effectively with cable carriers; (2) avoiding undermining the goals of cable's regulatory scheme; and (3) minimizing disruption of the existing market for local broadcast programming. See pp. 5-6, *supra*; H.R. Conf. Rep. No. 464, *supra*, at 92, 101-102. Petitioners argue (Pet. 24-25) that Congress acted to protect independent local broadcasters as a group, and that this purpose is fatal to the statute. But there is no reason to believe that Congress was motivated by any perceived differences in content between programming carried by independent local broadcasters and programming carried by others. As the Court explained in *Turner I*, even laws favoring some speakers over others require strict scrutiny only when "the legislature's speaker preference reflects a content preference." 512 U.S. at 658.[5] No such content preference is reflected in the SHVIA.

3. The market-based scope of the SHVIA license satisfies intermediate scrutiny. Congress's approach "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary." *Turner II*, 520 U.S. at 189. As we have explained, the SHVIA furthers the governmental interest of establishing a copyright licensing scheme that enables satellite carriers to compete fairly with cable operators, while disrupting as little as possible the market for audience and advertisers in which local broadcast stations operate. See pp. 5-6, *supra*; H.R. Conf. Rep. No. 464, *supra*, at 92.

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[5] In making that point, the Court in *Turner I* rejected an argument based on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that is essentially identical to the argument raised by petitioners here (see Pet. 14, 17).

While providing a valuable new benefit to satellite carriers, Congress wished to avoid inadvertently threatening local broadcast stations by making them less attractive to advertisers. Congress understood that a station-by-station statutory license would provide stations chosen for satellite carriage with access to a sizeable and growing audience, but that that audience would become largely unavailable to those stations that were not selected for carriage, even though those stations had previously reached an audience through free over-the-air broadcasts. See H.R. Conf. Rep. No. 464, *supra*, at 101. As with broadcast stations that would not be chosen for carriage by cable operators in the absence of the cable must-carry law, broadcast stations not chosen by satellite carriers would face the problem that consumers would dismantle (or not erect) television antennas or would not be willing to switch between satellite and over-the-air reception. See *id.* at 102; cf. *Turner II*, 520 U.S. at 219-221.

Congress was therefore concerned that local broadcast stations could be imperiled *because* Congress had granted satellite carriers a statutory exemption from generally applicable copyright laws. Creation of a statutory license that permitted satellite carriers to carry some, but not all, stations in a local market without regard to copyright restrictions would significantly change the playing field on which local stations compete for local advertising dollars. As the court of appeals recognized, "[b]y choosing a market-by-market license, Congress acted to minimize the unintended, disruptive effects of its intervention in the television marketplace." Pet. App. 51a. Thus, contrary to petitioners' submission (Pet. 15-21), the SHVIA does not rest simply on Congress's wish to ensure a diversity of broadcast options (although Congress plainly did perceive

that such diversity is an important government interest, and this Court has agreed, see *Turner I*, 512 U.S. at 647, 649). Rather, Congress acted to ensure that this important interest would not be undermined by its own alteration of the copyright regime.

In any event, there can be no serious doubt that the preservation of a diversity of outlets for broadcast video programming is an important governmental interest, even if the threat to that diversity does not come from purposeful anti-competitive conduct. In *Turner II*, the Court made clear that the cable must-carry law was enacted to promote three *independent* important governmental interests, two of which were "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources"; the third interest was "promoting fair competition in the market for television programming." 520 U.S. at 189. The Court "reaffirmed" in *Turner II* that "*each of those* is an important governmental interest." *Id.* at 189-190 (emphasis added).[6]

The Court in *Turner II* specifically rejected the dissent's assertion that the cable must-carry law could be justified *only* to protect broadcasters from cable opera-

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[6] See also *Turner II*, 520 U.S. at 190 (identifying a "governmental purpose of the highest order in ensuring public access to a multiplicity of information sources") (internal quotation marks omitted); *id.* at 192 (noting that "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public") (internal quotation marks omitted); *id.* at 194 (stressing that "[f]ederal policy * * * has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation").

tors' anti-competitive conduct. 520 U.S. at 194. The Court stressed, rather, that in light of the "essential part of the national discourse on subjects across the whole broad spectrum" served by broadcast programming, "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." *Ibid.* The same interest is sufficient to justify the terms of the satellite copyright license, which ensure that a multiplicity of broadcasters remain available to reach those who receive only over-the-air video signals as well as those who subscribe to cable and satellite services.

Congress also properly viewed the regulatory landscape as a whole and considered the overall impact on free television and programming diversity of cable and satellite providers together. See Pet. App. 35a-48a. Subscribers to satellite carriers, like subscribers to cable systems, often do not maintain (or do not utilize) antennas to receive over-the-air broadcasts but rather receive their video programming through the subscription service. See H.R. Conf. Rep. No. 464, *supra*, at 101-102; Pet. App. 42a n.8. In combination, cable and satellite providers represent a significantly *greater* threat to free broadcast television than was posed by cable in 1992 when Congress adopted the cable must-carry law that the Court upheld in *Turner II*. Compare *Turner II*, 520 U.S. at 197 (opinion of Kennedy, J.) (noting that cable had 60% share of television households in 1992) with Pet. App. 46a (noting that cable and satellite together control access to 80% of television households). Congress created a coherent regulatory structure that takes into account the cumulative impact of both cable

and satellite carriage on the availability of broadcast programming. See *id.* at 44a-48a.

Such an approach was particularly appropriate given the SHVIA's purpose of promoting fair competition between satellite carriers and cable operators. Petitioners essentially argue (Pet. 27) that Congress should have allowed satellite carriers to be selective in choosing among stations within a local broadcast market for carriage, without being required to pay compensation to copyright holders, even while cable operators remained subject to the strictures of the cable must-carry law. But such a regulatory regime would have significantly undermined Congress's intent that satellite and cable operators compete on fair terms. Congress wanted the SHVIA to ensure that satellite would be an "effective competitor" to cable, see H.R. Conf. Rep. No. 464, *supra*, at 92, but petitioners argue that the First Amendment required Congress to give satellite carriers terms of competition that are significantly more advantageous than those offered to cable operators. There is no grounding for that submission in the First Amendment.

4. Finally, even if petitioners' constitutional arguments had merit, the courts could not give petitioners the relief that they ultimately seek, a station-by-station statutory license. The market-wide nature of the statutory license is an integral part of the SHVIA scheme and is not severable from the grant of the statutory license to carry broadcast programs without compensation to copyright owners. As the court of appeals pointed out, Congress expressly considered and rejected the idea of giving petitioners a station-by-station license. See Pet. App. 23a-24a; H.R. Rep. No. 86, 106th Cong., 1st Sess. Pt. 1, at 16 (1999) ("In no event shall the [FCC] impose less than full must-carry on satellite

carriers that make local retransmission of television broadcast stations."). Indeed, Congress further provided that a satellite carrier that violates the full-market rules has no statutory copyright license and is expressly subject to liability and damages for copyright infringement. See 47 U.S.C. 338(a)(2) (Supp. V 1999); 17 U.S.C. 501(f) (Supp. V 1999).

This case presents a situation where Congress would not have enacted the legislation without the provision under constitutional challenge. Compare *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). Thus, if the market-based aspect of the SHVIA statutory license were found to violate the First Amendment, the courts would be obligated to invalidate the statutory license for satellite carriers in its entirety. Where, as here, a statute reflects an express trade-off of interests, with the regulated parties' benefits balanced by burdens, courts have recognized that it is inappropriate to permit the benefits to stand after the burdens have been struck down. See *Western States Med. Ctr.* v. *Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001) ("A statute's unconstitutional provisions are not severable if the entire statute is designed to strike a balance between competing interests."), aff'd on other grounds, No. 01-344 (Apr. 29, 2002); cf. *Bellsouth Corp.* v. *FCC*, 144 F.3d 58, 66 n.8 (D.C. Cir. 1998) ("[I]t is doubtful that Congress would have intended the many provisions of the Act beneficial to the [Bell operating companies] to survive deletion of this burdensome one[.]"), cert. denied, 526 U.S. 1086 (1999).

Thus, if this Court were to strike down the market-based term of the SHVIA license, it would be necessary to set aside the statutory license provision in its entirety. Petitioners would thereby have lost the right to invoke any statutory license to carry broadcast pro-

gramming without the copyright owners' authorization. Accordingly, whether or not this Court exercises review in this case, the only way that petitioners can obtain a statutory license to carry only particular local stations without compensating the copyright owners is to persuade Congress to adopt one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF LOCAL TELEVISION STATIONS, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, UNIVISION TELEVISION GROUP, INC., THE ASSOCIATION OF PUBLIC TELEVISION STATIONS, THE PUBLIC BROADCASTING SERVICE, AND THE CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Whether the Satellite Home Viewer Improvement Act, which provides direct broadcast satellite operators with a copyright license to retransmit local television broadcast programming without obtaining permission or paying royalties, violates the First Amendment because the license gives satellite carriers the option of copyright-free carriage only on a market-by-market basis, and not on a station-by-station basis.

RULE 29.6 STATEMENT

The National Association of Broadcasters has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Association of Local Television Stations has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Univision Network Limited Partnership's parent corporation is Univision Communications, Inc. No publicly held company, other than Univision Communications, Inc., owns ten percent or more of The Univision Network Limited Partnership's stock.

Univision Television Group, Inc.'s parent corporation is Univision Communications, Inc. No publicly held company, other than Univision Communications, Inc., owns ten percent or more of Univision Television Group, Inc.'s stock.

The Association of Public Television Stations has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Corporation for Public Broadcasting has no parent corporations, and no publicly held company owns ten percent or more of its stock.

The Public Broadcasting Service has no parent corporations, and no publicly held company owns ten percent of its stock.

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Respondents National Association of Broadcasters, Association of Local Television Stations, Inc., The Univision Network Limited Partnership and Univision Television Group, Inc., the Association of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting respectfully oppose the petition for certiorari.

STATEMENT

The petition for certiorari should be denied. The Fourth Circuit's carefully reasoned decision correctly rejected petitioners' novel and misconceived constitutional challenges to the Satellite Home Viewer Improvement Act ("SHVIA").[1] That decision does not conflict, directly or in principle, with the decision of any other court of appeals or of this Court, and does not present any question of exceptional legal or practical importance warranting review. In particular, there is no merit to the sole argument for review advanced in the petition – namely, the assertion that the Fourth Circuit's ruling contravenes the *Turner* decisions.[2] Far from conflicting with the *Turner* decisions – which upheld the mandatory must-carry requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the

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[1] Pub. L. No. 1006-113, Div. B, 113 Stat. 1536, 1501A-522 *et seq.* (codified in various sections of the Copyright Act and the Communications Act of 1934).

[2] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

"Cable Act")[3] against a First Amendment challenge – the Fourth Circuit faithfully followed the specific holdings of those cases in sustaining SHVIA. As the Fourth Circuit recognized, the present case is far easier than *Turner*. The must-carry provisions of the Cable Act generally *require* cable systems to carry all broadcasters that demand carriage. SHVIA, in contrast, gives satellite carriers the *choice* to retransmit all qualified local broadcast stations in any particular geographic market without obtaining copyright permission or paying for the privilege. SHVIA compels no speech, forbids no speech and burdens no speech. It creates a voluntary option that satellite carriers are free to take or leave.

Petitioners' First Amendment claims thus ignore the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *National Endowment of the Arts v. Finley*, 524 U.S. 569, 588 (1998) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)). SHVIA is in the latter category. It does not "extinguish[] petitioners' First Amendment right to choose what to say and what to leave unsaid." Pet. at 12 (quotation omitted). To the contrary, SHVIA does not interfere with that right at all. Petitioners have exactly the same right they had before SHVIA to choose "what to say." If what they want to say – *i.e.*, to transmit – happens to be copyrighted programming owned by someone else, petitioners remain free to secure the necessary copyright permissions to transmit that programming. SHVIA gives petitioners the additional option of carrying all the local television broadcast stations in a

[3] Pub. L. No. 102-385, 106 Stat. 1460.

particular market without securing permission or paying royalties. If petitioners do not want that option, they can decline it and thereby "leave unsaid" all they want to leave unsaid. What petitioners want is a "freedom" they never had before SHVIA. They seek to use the First Amendment to rewrite SHVIA to grant them a compulsory copyright license far more expansive and advantageous than the license Congress chose to confer. They seek, in other words, an utterly unprecedented First Amendment right to exploit for their own purposes broadcast programming owned by others pursuant to indisputably valid copyrights. Viewed in this light, petitioners' challenge to SHVIA is insubstantial, and does not remotely warrant review.[4]

A. Background

This case arises in the context of a complex and dynamic interaction among the three principal means of distributing video programming – over-the-air broadcasting, cable, and satellite. A proper understanding of SHVIA requires an appreciation of that context, which the petition for certiorari largely omits. Indeed, whereas petitioners seek to convey the

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[4] This case raises no issue related to the issues on which review was granted in *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1170 (2002). Although petitioners made a cursory argument in the Fourth Circuit that the market-by-market compulsory license afforded by SHVIA exceeds Congress's powers under the Copyright Clause, the petition for certiorari does not raise that issue, and rests exclusively on First Amendment grounds. In any event, the present case differs fundamentally from *Eldred* because petitioners here have never raised a challenge of any kind to the validity of the underlying copyright in broadcast programming. Rather, petitioners challenge the scope of the compulsory license given them to use broadcast programming notwithstanding the valid copyrights in that programming.

impression that SHVIA was an unwanted burden imposed on them by Congress in order to benefit local broadcasters, the reality is that Congress enacted SHVIA at petitioners' behest (granting them a sweeping compulsory copyright license to use broadcast programming belonging to others) in order to improve petitioners' competitive prospects. And SHVIA has had precisely that effect. In the years since its passage, petitioners' market share has expanded by millions of households, largely because of the very copyright license petitioners attack in this case. Petitioners' constitutional challenge is nothing more than an effort to change the copyright terms Congress has offered in SHVIA to make them even more commercially advantageous to satellite carriers, at the expense of the competing interests of broadcasters, cable operators and the viewing public, which Congress also sought to accommodate.

Over-the-Air Broadcasting. For several decades after the advent of television, most Americans relied on over-the-air broadcasting to receive video programming. "Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television station within the antenna's range." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) ("*Turner I*"). Viewers pay nothing to receive over-the-air television. Commercial stations are supported by advertisers; revenues depend on audience size. Noncommerical stations are supported in large part by viewer contributions. Because it uses electromagnetic spectrum, broadcasting has been regulated by the federal government since 1927. Radio Act of 1927, 44 Stat. 1162; Communications Act of 1934, 48 Stat. 1064. Since 1952, the Federal Communications Commission ("FCC") has maintained an allocation system

that generally ensures that communities have at least one broadcast outlet for local programming and as many diverse programming sources as the broadcast spectrum will permit and economic conditions will sustain. 47 C.F.R. § 73.606; *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 26 (D.C. Cir. 1954). Thus, the FCC licenses stations to serve specific local markets. Although some stations are independent, most are affiliated with either the major networks – CBS, ABC, NBC, and FOX – or emerging networks, such as WB, UPN, Univision, or PAX. Network-affiliate contracts grant affiliates the right to broadcast network programming in their markets. Stations also produce, or acquire rights to transmit, additional programming.

Cable. Cable was the nation's first paid television service. Its initial function was to "bring clear broadcast television signals to remote or mountainous communities. The purpose was not to replace broadcast television but to enhance it." *Turner I*, 512 U.S. at 627. Cable operators are licensed by local governments to serve individual communities. Each licensee's distribution system is local, consisting of a wireline network connecting subscribers to a "head-end" from which programming is transmitted. Cable operators acquire rights to transmit programming, and are supported by subscriber fees as well as by revenues from selling advertising time slots. As cable became more popular, networks such as ESPN and HBO emerged to provide operators with additional programming options. By 1992, cable had replaced over-the-air broadcasting as the principal means by which Americans received video programming, but local broadcast stations (viewed both over-the-air and on

cable systems) remained the most popular programming by a wide margin. *Id.* at 627-28, 634.

As cable became an increasingly powerful competitor of over-the-air broadcasting, it was made subject to a mandatory duty to retransmit local television stations. Originally mandated by the FCC, this "must-carry" obligation was codified by Congress in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535. In imposing the cable must-carry requirement, Congress sought to preserve "the benefits of free, over-the-air broadcast television" for those who cannot afford paid services and to promote "the widespread dissemination of information from a multiplicity of sources" – policy interests that this Court has deemed to be of the highest national importance. *Turner I*, 512 U.S. at 662.

This Court recognized in *Turner I* that the cable must-carry requirement is critical to the survival of a vibrant over-the-air broadcast system. A station refused carriage on a cable system loses its access to that system's subscribers. Because broadcast advertising revenues are based on the size and demographic composition of the viewing audience, losing cable subscribers as potential viewers is a double blow to broadcasters. It both reduces audience size and siphons off the affluent viewers that comprise the most desirable segments of the audience. Such losses trigger a downward spiral in which lower revenues necessitate the purchase of less expensive programming, which attracts fewer viewers, which in turn further depresses revenues and diminishes audiences. This decline in over-the-air broadcasting is particularly devastating to the millions of Americans –

usually the less wealthy – who depend on broadcasting as their only source of video programming. *Id.* at 663.

Satellite. Satellite systems deliver video programming to subscribers' homes by uplinking signals to orbiting satellites and then beaming those signals from the satellites to the homes of individual subscribers, where they are received by a "dish" connected to each subscriber's television. At its inception in the 1980s, satellite was primarily a rural service that transmitted signals to six- to ten-foot-wide dishes. In the mid-1990s, Direct Broadcast Satellite ("DBS") providers such as EchoStar and DIRECTV, entered the market offering much smaller dishes and catering to urban and suburban subscribers. Like cable operators, satellite carriers acquire the rights to retransmit programming created by others, and are supported by subscriber fees. Historically, satellite television was principally a national service. Orbital satellites could not send signals targeted to particular localities, but instead transmitted signals that covered the entire country.

As the technology and service offerings of DBS improved, satellite and cable increasingly competed for the same customers. Cable, however, had an advantage because it could offer the most popular video programming – local broadcast television stations. In 1976, before most cable networks existed and before it was clear that there would be a substantial market for paid video services, Congress gave cable operators a statutory copyright license to retransmit the signals of over-the-air broadcast stations. 17 U.S.C. § 111(c). Cable operators therefore could transmit local broadcast stations without obtaining copyright permissions or paying royalties. Satellite providers found that the

inability to offer local broadcast stations was a significant competitive disadvantage. Although advances during the 1990s enlarged the technological ability of satellite carriers to provide local broadcast stations to their subscribers, they lacked the legal right to do so because they did not have a compulsory license comparable to the one Congress had given cable.[5] They thus could retransmit local broadcast stations only if they obtained and paid for all the necessary copyright permissions. Satellite carriers believed they needed a statutory copyright license for local broadcast programming in order effectively to compete with cable, and vigorously lobbied Congress to grant them such a license.

B. Satellite Home Viewer Improvement Act

In November 1999, Congress enacted SHVIA, Pub. L. No. 1006-113, Div. B, 113 Stat. 1536, 1501A-522 *et seq.* (codified in various sections of the Copyright Act and the Communications Act of 1934). The statute responded to the satellite carriers' pleas for assistance, but did so in a manner consistent with national communications policy. Section 1002 of SHVIA granted satellite carriers copyright licenses to carry the programming of local television stations without

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[5] Because cable retransmission of distant network stations would threaten the viability of local network stations carrying the same programming, the FCC imposed "network nonduplication" rules that generally prohibit cable systems from retransmitting distant network stations. 47 C.F.R. § 76.92. Therefore, when Congress first considered statutory copyright licenses for satellite carriers, it offered licenses that allowed retransmission of independent stations throughout the country but limited retransmission of major network affiliates to households that could not receive their local affiliate over the air. 17 U.S.C. § 119 (1988).

going through the normal marketplace mechanisms of obtaining permission and paying the copyright holder. Section 1008 of SHVIA established that the licenses were available on a market-by-market basis – and not on a station-by-station basis as the satellite carriers would have preferred. Sections 1002 and 1008 of SHVIA together define the scope of the royalty-free licenses. *See* H.R. Conf. Rep. No. 106-464, at 100 (1999) ("as of January 1, 2002, royalty-free copyright licenses . . . will be available only on a market-by-market basis"). Both sections make clear that retransmitting local broadcast signals without complying with the licenses' terms is not protected and therefore subject to ordinary copyright rules. *Id.* at 94 ("the statutory license overrides the normal copyright scheme only to the extent that carriers strictly comply with the limits Congress has put on that license"). Additionally, Congress carefully tailored the SHVIA carriage provision. Satellite carriers opting to use a license in a particular market were not required to carry broadcast signals that fell below a designated level of quality or that substantially duplicated the programming of other carried signals. 47 U.S.C. § 338(b)-(c). And Congress imposed a "retransmission consent" option analogous to that of the Cable Act. This option allowed individual broadcast stations to decline the prospect of free carriage, and to insist that a satellite carrier provide compensation in exchange for the right to retransmit the station. Any station opting for retransmission consent could not claim any right to be carried pursuant to SHVIA. 47 U.S.C. § 325(b)(4).

Contrary to petitioners' suggestions, SHVIA was not enacted merely "to correct an unfair competitive advantage that cable systems enjoyed over satellite carriers." Pet. at 5. To the contrary, SHVIA reflects a complex and delicate

balance of competing objectives. On the one hand, Congress granted satellite carriers royalty-free copyright licenses to carry local broadcast signals in response to the carriers' claims, during the course of extensive hearings, that such licenses were essential to enable them to compete with cable. At the same time, Congress sought to prevent satellite carriers from gaining unfair competitive advantages. Accordingly, Congress required satellite carriers that availed themselves of the SHIVA license in a particular market to carry all qualified broadcast stations in that market. This provision subjects satellite carriers to a carriage term comparable to that of cable operators. Most importantly, by ensuring that local broadcast stations could continue to reach their full potential audience, SHVIA also protects the fundamental communications policy goal of "preserv[ing] the benefits of free over-the-air local television" for households unable to obtain pay video services and maintaining "the widest possible dissemination of information from diverse and antagonistic sources." *Turner I*, 512 U.S. at 662-63 (quotation marks and citation omitted).

The legislative record amply supported each component of this delicate balance. Representatives from the satellite industry testified that only the ability to carry local stations would enable satellite to compete effectively with cable. *E.g.*, *Reauthorization of the Satellite Home Viewer Act: Hearings Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. 72 (Feb. 24, 1999) (hereinafter "2/24/99 Hrgs.") (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar) ("[M]ost of the consumers walking out of the store without a satellite dish cite the unavailability of local signals as the reason.");

Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm., 105th Cong. 4 (Feb. 4, 1998) (hereinafter "2/4/98 Hrgs.") (statement of Charles W. Ergen, President, EchoStar) (testifying that satellite carriers had lost as many as 40 million subscribers as a result of failing to carry local stations); *Video Competition: Multichannel Programming: Hearings on H.R. 2921 and H.R. 3210 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 44 (Apr. 1, 1998) (hereinafter "4/1/98 Hrgs.") (statement of Eddie Hartenstein, President, DirecTV) (testifying that consumers would not pay for cable to obtain local broadcast stations in addition to satellite service).

Congress also received ample evidence that, if given the option, satellite carriers would carry only a handful of stations and exclude many others, resulting in harm to noncarried stations. H.R. Conf. Rep. No. 106-464, at 101. Indeed, EchoStar was already cherry-picking a few stations in each market. 2/4/98 Hrgs. at 77-78 (Appendix One to Statement of James J. Pophan, Vice President and General Counsel, ALTV). Petitioners' complaint in the instant action confirms the accuracy of Congress's predictive judgment, for petitioners expressly alleged that if they were granted station-specific copyright licenses, they would carry only a small fraction of local broadcast television stations.

Congress also knew that in markets where satellite carriers opted not to take advantage of the package license, local television stations would be unaffected, because satellite subscribers would acquire alternative access to the local

stations they watched most of the time. *Copyright Compulsory License Improvement Act: Hearings on H.R. 768 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 33 (Feb. 25, 1999) (here after "2/25/99 Hrgs.") (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar) (stating that 70% of the time people watch television, they watch local stations). But partial carriage did pose a grave threat: Subscribers who received the most-watched local stations by satellite were unlikely to undertake the trouble and expense of installing rooftop antennas or subscribing to cable to obtain the remaining stations. H.R. Conf. Rep. No. 106-464, at 102. Congress, having learned from its experience with cable, chose not to provide satellite carriers with the means to harm the system of free over-the-air television.

Congress also received substantial evidence – from the satellite carriers themselves – that the carriers would be able, under SHVIA's copyright licenses, to provide local stations to most, if not all, of the country. Petitioner EchoStar testified that, with "spot beam" technology, it could provide local stations to fifty percent of the nation's households from certain orbital slots and could offer "consumers in many smaller markets" local stations from other orbital slots. 2/24/99 Hrgs. at 72-73 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar); *see also* 2/25/99 Hrgs. at 31 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar). LTVS, a member of Petitioner SBCA, testified that satellite television also could be delivered from a different spectrum band (Ka-band) than was currently used and that a single orbital slot would provide sufficient capacity to transmit

every standard definition broadcast station in the country. 4/1/98 Hrgs. at 36 (statement of James F. Goodmon, President and Chief Executive Officer, Capitol Broadcasting Company). EchoStar also informed Congress that progress in compression technology represented yet another means of providing more channels of programming from the same spectrum. *Id.* at 130 (statement of Charles W. Ergen, President, EchoStar); *see also* H.R. Rep. No. 106-79, at 14 (1999).[6]

Finally, Congress delayed the effective date of SHVIA's full carriage provision by more than two years in response to the satellite carriers' admonitions that financial considerations militated in favor of providing local stations "a little bit at a time." 2/24/99 Hrgs. at 95 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar); *see also* 4/1/98 Hrgs. at 111 (statement of Charles W. Ergen, President, EchoStar).

C. Proceedings Below

On September 20, 2000, petitioners brought a suit in the United States District Court for the Eastern District of Virginia alleging that SHVIA violates the Copyright Clause,

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[6] Congress's prediction that the satellite carriers could increase their capacity dramatically was confirmed by Petitioner EchoStar and DirecTV's recent submission to the FCC, as part of their application for approval of their proposed merger, of a plan for full carriage of all stations in the United States. Pet. at 7 n.2 ("After the entry of the decision below, EchoStar and DIRECTV announced that the additional capacity that would be generated if the merger is approved would enable them to offer local-into-local service to all markets nationwide as soon as 2 years later.").

the First Amendment, and the Due Process and Takings Clauses of the Fifth Amendment. Respondents intervened to defend SHVIA, and along with the United States and the FCC, moved to dismiss the complaint for failure to state a claim. On June 19, 2001, the district court granted the motions to dismiss.

The Fourth Circuit affirmed. It first concluded that SHVIA was not subject to strict scrutiny. SHVIA's market-by-market license, the court reasoned, was triggered not by a satellite operator's decision to carry broadcast programming of a particular content, but by the choice to make use of the royalty-free copyright license. Pet. App. 30a. The court also rejected the argument that SHVIA had a content-based purpose because it sought to promote the survival of independent broadcast stations. In the *Turner* decisions, the court noted, this Court had recognized that the cable must-carry rules primarily benefited independent broadcast stations, but nevertheless concluded that the regulations' purpose was content-neutral. Pet. App. 31a-32a.

The Fourth Circuit declined to address the argument that SHVIA should be evaluated under the rational basis standard, because it found that the statute passed constitutional muster under intermediate scrutiny. The court found that the interests that SHVIA was designed to serve were plainly important and unrelated to the suppression of speech and that those interests would be threatened by a copyright license lacking a carry-one, carry-all obligation. Pet. App. 36a-37a. Congress, the court held, reasonably concluded based on substantial evidence that, left to their own devices, satellite operators would carry only the most popular network affiliates, that noncarried stations would

suffer significant economic harm, and that this financial distress would lead to a decline in the quality and diversity of broadcast television programming. Pet. App. 37a-48a. Therefore, the Fourth Circuit concluded, SHVIA comports with the First Amendment.

REASONS FOR DENYING THE PETITION

The petition for certiorari advances no persuasive reason for granting review.

1. There is no conflict between the Fourth Circuit's decision and that of any other Circuit. The few courts that have considered challenges like the one petitioners assert here – which claim a First Amendment right to make free and unrestricted use of copyrighted material owned by others – have rejected them out of hand.

In *CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3626 (U.S. Mar. 28, 2002) (No. 01-1450), for example, the Eleventh Circuit rejected a First Amendment challenge brought by one of the petitioners in this case, EchoStar, to a statutory copyright license that authorized satellite carriers to retransmit distant network signals to persons residing in households that could not receive adequate over-the-air transmission of local signals. *Id.* at 1199. Echostar argued that this provision violated the First Amendment because it did not also grant satellite carriers a copyright license to retransmit distant broadcast signals to households that were adequately served by local over-the-air stations. Rejecting that contention, the Eleventh Circuit held that the challenged provision merely "creates a

narrow exception to the generally applicable, and constitutional, Copyright Act . . . [and] does not threaten . . . free speech rights but actually permits more speech than EchoStar would constitutionally be entitled to under the Copyright Act." *Id.* at 1209.

Similarly, in *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989), the D.C. Circuit rejected a First Amendment challenge to an FCC "syndicated exclusivity" rule allowing the supplier of a syndicated television program to agree with a broadcast television station that the station would be the exclusive presenter of the program in its local broadcast area. *Id.* at 1176. The station, in turn, could forbid the local cable television system from importing the program into its local broadcast area from a distant station. *Id.* Cable operators challenged the rule on First Amendment grounds, arguing that, by preventing them from transmitting a syndicated program into an area in which local broadcast station held exclusive presentation rights, the rule unconstitutionally restrained their speech. *Id.* at 1190. The D.C. Circuit disagreed, noting that while cable providers generally enjoy a statutory copyright license to retransmit television broadcasts, Congress and the FCC had provided that they did *not* have such a license where transmission would violate the syndicated exclusivity rule. *Id.* As the court explained, there simply is "no First Amendment right to . . . make commercial use of the copyrighted works of others." *Id.* at 1191.

As these decisions recognize, it is claims such as the one petitioners advance here – and not the compulsory copyright licenses under challenge – that ultimately threaten freedom of expression. To promote the progress of science and the

arts, Section 106 of the Copyright Act, 17 U.S.C. § 106, defines for copyright holders a set of *exclusive* rights. On occasion, Congress has concluded that the public interest would be better served by giving Section 106 less than its full scope, and has created compulsory licenses that allow others the right to make use of copyrighted works under certain conditions. Such conditions balance the rights of the copyright holder with the interests of others who wish to use the copyrighted material without obtaining permission. *E.g.*, 17 U.S.C. §§ 111(c)(1)-(3), 114(d)(2), (j)(13), 115(a). Following the reasoning of petitioners here, such provisions could be described as infringements upon the "editorial discretion" of the party wishing to use the copyrighted expression, in the sense that the user is less free to make use of the expression than if the conditions were not imposed. But the user has far more freedom than if the compulsory license had not been granted in the first place. Thus, the position petitioners advocate here would simply serve to strip Congress of the power to grant conditional copyright licenses. Such an argument misconceives the core purposes of copyright, and would have the perverse result of decreasing the amount of expression available for use by the public.

2. The Fourth Circuit decision does not conflict in any respect with the *Turner* decisions. To the contrary, the Fourth Circuit scrupulously followed those decisions.

a. The Fourth Circuit did not depart from the *Turner* decisions when it rejected petitioners' argument that SHVIA could be upheld only on the basis of a showing that satellite carriers possess monopoly power, and would use that power to compete unfairly against television broadcast stations. To

the contrary, in *Turner II* a majority of the Court rejected precisely what petitioners now claim the Court held. Justice Kennedy's opinion for four Members of the Court disavowed the proposition that the cable must-carry requirement "can only be justified as . . . a measure to protect broadcasters from . . . anticompetitive behavior." 520 U.S. at 194. There is, this Court explained, an independent interest in "preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation." *Id.* Justice Breyer's concurring opinion likewise concluded that the mandatory cable must-carry requirements could be upheld solely on the basis of Congress's interest in preserving a multiplicity of broadcasters. *Id.* at 225-26.

In any event, the issue of market dysfunction was relevant in the *Turner* decisions only because it provided the foundation for Congress's conclusion that cable systems would not carry large numbers of broadcasters voluntarily. *E.g.*, *id.* at 197 ("Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel."); *id.* at 198 ("Congress concluded that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services . . . Extensive testimony indicated that cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers.") (internal quotation marks and citations omitted); *id.* at 200 ("In addition, evidence before Congress, supplemented on remand, indicated that cable systems would have incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience

and advertisers."). Here no such showing is necessary because petitioners specifically told Congress, and expressly alleged in their complaint in this case, that they would not carry most local broadcast stations if given a station-by-station compulsory license.

Moreover, it should be noted that the premise of petitioners' argument – that their decisions about what to carry are "governed solely by viewer demand," Pet. at 16 – is false. Indeed, there is a fundamental mismatch between viewer preferences and the basis on which satellite carriers make programming decisions. Because satellite programming is for the most part distributed on a nationwide basis, a satellite carrier's decision to carry a national programming service such as the Food Channel rather than a particular local broadcast station is based on the fact that *on a nationwide basis* that programming service is likely to attract a larger audience than that particular local broadcaster. But within the broadcaster's home market, it will, in almost all instances, be preferred by more viewers than will the nationwide programming service. *Turner II*, 520 U.S. at 206 (least watched local broadcaster is more popular than many cable programming services). Thus, in maximizing their profits nationwide, petitioners will not be reflecting the true viewing preferences of consumers.

b. The Fourth Circuit did not depart from the *Turner* decisions when it rejected petitioners' plea for strict scrutiny. To the contrary, the case for strict scrutiny here is far weaker than it was in *Turner*.

Petitioners' principal argument for strict scrutiny rests on a fallacious premise. As petitioners would have it, SHVIA's

carriage term is necessarily content-based because it "is on its face entirely dependent upon the *stations* the [satellite] operator has selected or will select," in that a satellite carrier's decision to carry one local broadcast station in a market will trigger the obligation to carry all others in that market. Pet. at 21-22 (internal quotation marks and citations omitted). As the Fourth Circuit recognized, however, "SHVIA's carriage obligations are not triggered *simply* by the decision to carry a local broadcast station in a given market. Instead, they are triggered by the decision to carry that station *by making use of the § 122 license*." Pet. App. 30a (emphasis in original). In other words, SHVIA's carriage provision applies only if a satellite carrier chooses to rely on SHVIA's royalty-free license to acquire the rights to retransmit a broadcaster's programming. If a satellite carrier obtains copyright permissions in the marketplace through some means other than the royalty-free license, it may carry – and exclude – whatever stations it chooses. Thus, the same broadcast station content will trigger SHVIA's carriage provision if the satellite carrier depends on the royalty-free license for the right to retransmit it, but not if the carrier secures the ability to carry that content in some other way, such as through individualized negotiations with the copyright holders. It is the carrier's decision to choose one economic arrangement (the royalty-free license) rather than another (negotiated permission) that triggers SHVIA. Indeed, it makes little sense to say that a satellite carrier's choice to carry a single broadcast station in a market (without securing copyright permission) triggers an obligation to carry other stations. That is not a choice carriers had before SHVIA, and it is not a choice SHVIA gives them.

Petitioners' claim that SHVIA is "materially indistinguishable" from the right-of-reply statute this Court held unconstitutional in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), also lacks force. In *Turner I*, this Court found *Tornillo* inapplicable for reasons that are equally true here: (1) the carriage requirement is not triggered by the expression of particular viewpoints, and carriage rights are not granted "on the ground that the content of broadcast programming will counterbalance the messages of [satellite] operators," 512 U.S. at 655; (2) the access provided to broadcasters will not "force [satellite] operators to alter their own messages to respond to the broadcast programming they are required to carry, *id.*; (3) there is "little risk that [satellite] viewers would assume that the broadcast stations carried on a [satellite] system convey ideas or messages endorsed by the [satellite] operator," *id.*; and (4) the provisions will not "cause a [satellite] operator to conclude that the safe course is to avoid controversy," *id.* at 656 (internal quotation marks and citations omitted). There is simply no inconsistency between *Tornillo* and the Fourth Circuit's decision in this case.[7]

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[7] Petitioners' assertion that they have no choice other than to submit to SHVIA's carriage term because they cannot, as a practical matter, "privately negotiat[e] the thousands of copyright clearances required for even a single day of programming," Pet. at 22, is irrelevant. The First Amendment would be implicated only if SHVIA withdrew a preexisting speech right; the Constitution does not require Congress to assist satellite carriers in obtaining the copyrighted works of others on terms the carriers would prefer. Even if a satellite carrier "does not have [the benefit] it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such [benefit] as may be necessary to realize all the advantages of that freedom." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (internal quotation marks and citation omitted); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985) (holding

Nor is strict scrutiny warranted on the theory that SHVIA has the content-based purpose of promoting "major market independent broadcast stations" at the expense of "network affiliates in smaller markets." Pet. at 25. This Court made clear in *Turner II* that Congress's imposition of must-carry to protect less watched, more vulnerable stations was content-neutral even though popular network affiliates would have been carried voluntarily. 520 U.S. at 191-92 (noting that "Congress was under no illusion" that popular local television stations needed the protection of a must-carry requirement). In any event, petitioners have not even attempted to show that any such distinction is content-based. Such a proposition is by no means self-evident and, upon a cursory comparison of the programming of independent stations and network affiliates, appears implausible. Major network affiliates and their independent counterparts alike broadcast dramas, situation comedies, and feature films. In fact, they often offer identical programming, with network affiliates showing it first during primetime hours and less popular stations broadcasting it later in syndication. At most, petitioners have posited that SHVIA contains speaker-based preferences. But, as this Court indicated, "so long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner I*, 512 U.S. at 45.

c. The Fourth Circuit did not depart from the *Turner* decisions in its application of intermediate scrutiny to SHVIA. Although petitioners make sweeping claims that the court of appeals "refused to apply the standard announced in

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that there is no right to the use of copyrighted works without the permission of the copyright owner).

Turner II, and fundamentally reworked this Court's intermediate scrutiny jurisprudence," Pet. at 26, their real complaint is exceedingly narrow. Petitioners do not dispute (nor could they, in view of the *Turner* decisions) that the core purposes of SHVIA – "to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources," H.R. Conf. Rep. No. 106-464, at 101-02 – are important governmental interests unrelated to the suppression of free speech. *Turner II*, 520 U.S. at 189-90 (citing *Turner I*, 512 U.S. at 662). Nor do petitioners contend that SHVIA fails the narrow tailoring prong of intermediate scrutiny. Such an argument would be impossible to sustain in view of the fact that petitioners decide for themselves precisely how much of the alleged "burden" to assume under SHVIA's voluntary market-by-market license approach. *See also supra* page 9 (noting ways that Congress narrowed scope of SHVIA's carriage provision).

Petitioners' only argument is that Congress lacked a sufficient basis for concluding the important interests SHVIA is designed to serve would be threatened by noncarriage of local broadcast stations on satellite systems. Because satellite carriers serve only approximately 15% of viewers, petitioners contend, the potential audience loss is not sufficiently great to cause the kinds of severe adverse financial consequences that would follow if a broadcast station were excluded from a local cable system.

That argument misses the fundamental point. Congress knew, from its experience with the cable industry, that broadcast stations denied carriage on paid video

programming services would lose significant portions of their audience. Specifically, in the *Turner* cases, Congress found – and this Court confirmed – that stations denied carriage on cable systems would face a loss of viewership that would in turn result in a decline in its ability to attract advertising revenue and, ultimately, in the quality and diversity of its programming:

> Simply put, a television station's audience size directly translates into revenue – large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.

Turner II, 520 U.S. at 208 (quoting congressional testimony).

For purposes of promoting the interests that both the Cable Act and SHVIA seek to protect, it does not matter whether that injury is inflicted as a result of exclusion from one monopoly supplier of paid video programming or from two or three suppliers who divide the market among them. Once the overall Congressional judgment to protect against this harm has been vindicated, Congress must have the power to guard against piecemeal destruction of that interest.

Moreover, Congress reasonably predicted that SHVIA would provide such a boost to satellite's popularity that its

market share – and the effect on broadcast stations of its refusal to carry them – would grow rapidly. The satellite carriers unequivocally indicated that they intended to compete with cable for subscribers. A royalty-free license, they argued, would help them do so. EchoStar's president, for example, testified that the satellite industry had lost as many as 40 million subscribers as a result of its failure to carry local broadcast stations. 2/4/99 Hrgs. at 4 (statement of Charles W. Ergen). Thus, Congress had every reason to believe that exclusion from satellite systems would, by itself, put large numbers of stations at risk of incurring substantial financial harm, and thereby serving their audiences significantly less well or not at all.

3. Review is also unwarranted because the Fourth Circuit's judgment can be sustained on an alternative ground. SHVIA is entirely voluntary. It neither compels nor restricts speech. SHVIA confers an optional benefit that petitioners are free to take or leave. To the extent it affects their speech opportunities, it expands those opportunities by giving satellite carriers copyright-free access to the expression of others that they previously could transmit only by incurring the burden and expense of securing permission to do so. Such a provision is simply not subject to the kind of First Amendment scrutiny – strict or intermediate – that petitioners urge.

A provision such as SHVIA, which confers benefits and imposes no restrictions, could run afoul of the First Amendment only if it were deemed to be an unconstitutional condition. But SHVIA imposes no unconstitutional condition because it does not require petitioners to surrender an "independent benefit" in order to obtain another

government good. *Taxation With Representation*, 461 U.S. at 545.

This Court has repeatedly held that conditions reasonably related to the benefit offered are permissible and that conditions that define that scope of a government benefit are by definition reasonably related to that benefit. *Id.*; *Rust v. Sullivan*, 500 U.S. 173, 197 (1991). When Congress chooses to grant a benefit, it is entitled to define the scope of that benefit. Thus, in *Rust*, this Court explained that the First Amendment poses no obstacle to Congress's decision to use selective grants "to encourage certain activities it believes to be in the public interest" without, at the same time, funding an alternative approach. 500 U.S. at 192-93 (upholding Congress's decision that programs receiving government grants could offer counseling about family planning but not about abortion). This Court has approved such benefit programs precisely because they do not interfere with a speaker's exercise of editorial discretion or, for that matter, any other protected activity.

The unconstitutional conditions doctrine does not apply to laws that confer benefits to be used only for predefined purposes. *See, e.g.*, *Rust*, 500 U.S. at 194; *Lyng v. International Union, United Automobile Workers*, 485 U.S. 360, 369 (1988); *Taxation With Representation*, 461 U.S. at 545; *Cammarano v. United States*, 358 U.S. 498, 513 (1959). SHVIA is precisely that sort of provision. It does not force petitioners to forgo any "protected conduct" to obtain its benefits. They remain free to acquire and use copyright permissions from the actual copyright holders for programming they wish to retransmit, and to retransmit only that programming. They also remain free to decline to carry

broadcast stations in any or all markets. The provision only helps define how the license Congress granted may be used. 47 U.S.C. § 338(a). In this case, as in *Rust*, "the Government is not denying a benefit to anyone, but is instead simply that [the licenses be used] for purposes for which they were authorized." 500 U.S. at 196.

Congress's decision to help satellite carriers retransmit the signals of all broadcast stations to subscribers in a particular market – but not giving them the added benefit of permission to retransmit the signals of only some broadcast stations – is simply a decision to encourage one activity without interfering in any way with alternative editorial choices. Petitioners' disappointment over the particular form of corporate welfare Congress decided to give them does not implicate the First Amendment and therefore is not subject to heightened scrutiny.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATION ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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The briefs in opposition all but ignore the grave First Amendment questions presented by the decision below. Instead, they rest on the proposition that satellite carriers, like cable operators, must swallow the "bitter" must-carry restriction with the "sweet" statutory copyright license. But the satellite medium should not be forced to swallow the bitter medicine of must-carry because it, unlike the cable medium, is not afflicted with the disease of "bottleneck monopoly power." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) (*Turner I*).

As the Fourth Circuit recognized, *see* App. 45a, 53a-56a, its decision upholding the carry-one, carry-all provision of SHVIA substantially extended this Court's reasoning in *Turner I* and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). Only Justice Breyer opined that a speech-restrictive cure could be imposed absent dysfunction in the marketplace of ideas whenever Congress seeks to promote a diversity of speakers in the market. This Court has always held that, absent such market dysfunction, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

And even if a majority of this Court were to adopt Justice Breyer's view that preservation of a multiplicity of speakers, standing alone, justifies a legislative restriction on speech, the Constitution does not allow Congress simply to "posit the existence of the disease sought to be cured," *Turner I*, 512 U.S. at 664 (citation and internal quotation omitted), and to impose the restriction without a showing that the disease actually exists and the restriction is likely to cure it. Yet the decision below imposes the forced-carriage medicine on satellite carriers on the basis of Congress' diagnosis of another patient; the Fourth Circuit justified the restriction on satellite speech "by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects." App. 48a. There is no evidence whatever supporting

the proposition that carry-one, carry-all will preserve even a single broadcast station that otherwise would go dark.

1. Respondents attempt to dissuade the Court from reviewing these important questions of First Amendment law (and thus permanently insulate SHVIA from review by this Court) primarily by contending that the conditional nature of the restriction makes it no restriction at all. Fed. Resp. Br. 11. The fact that the restriction is not absolute, but merely operates as a condition upon the grant of a valuable government license, does not make it any less a restriction on speech. *See Turner I*, 512 U.S. at 636 ("by exercising editorial discretion over which stations or programs to include in its repertoire," cable operators engage in speech) (citation and internal quotation omitted). Thus, it does not follow, as respondents argue, that petitioners' real complaint is with the constitutionally unexceptionable copyright law, not with the condition Congress attached to the statutory copyright license.

This Court has long recognized that "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In particular, "[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Id.* Thus, respondents are wrong when they derisively claim "[p]etitioners' disappointment over the particular form of corporate welfare Congress decided to give them does not implicate the First Amendment," NAB Resp. Br. 27, just as it clearly would be wrong to dismiss a welfare mother's First Amendment claim were Congress to condition her benefits upon her agreement to kneel before golden idols.

Respondents attempt to skirt this settled precedent by claiming that SHVIA's forced carriage regime merely "define[s] the scope" of the benefit contained in the statutory license. NAB Resp. Br. 26-27; Fed. Resp. Br. 12. But this Court has already rejected this overly clever construct: "Congress cannot recast a condition . . . as a mere definition of its

program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 547 (2001). To the same end, respondents mischaracterize SHVIA as having created a "market-by-market license" that imposes no speech restriction whatsoever, but simply provides a license to use a "market-copyright." Fed. Resp. Br. 12. But SHVIA quite unambiguously provides satellite carriers with a right to retransmit the signal of "a television broadcast *station*," not a market, 17 U.S.C. § 122(a), App. 336a (emphasis added), and then conditions the exercise of that right upon the requirement that the satellite operator carry free of charge *any additional station* that requests carriage, 47 U.S.C. § 338(a), App. 344a-45a.[1] Moreover, respondents' construct is untenable on its own terms. While a day of programming compiled and aired by a particular station may be copyrighted, *see NAB v. Copyright Royalty Tribunal*, 675 F.2d 367, 377-78 (D.C. Cir. 1982), there is no such thing as a "market copyright" encompassing all of the programming broadcast by every television station in a geographic market.

Intervening respondents attempt to analogize this case to this Court's decisions upholding limitations upon benefits granted by Congress in the exercise of its spending and taxation powers. NAB Resp. Br. 25-27. However, this is not a case, as in *Rust v. Sullivan*, 500 U.S. 173 (1991), where the government has chosen to subsidize particular speech, while withholding financial support from speech with which it does not agree. *See Velasquez*, 531 U.S. at 541. Rather, SHVIA's forced carriage requirement seeks to leverage Congress' *regulatory* power over copyright to force private speakers (satellite companies) to carry speech (unpopular independent stations) that they do not wish to carry. This case is therefore

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[1] Thus, the Solicitor General's statement that "Congress did not create an unrestricted statutory license to retransmit a single station in a given market and then attach restrictions on free expression as conditions to that new 'right,' " Fed. Resp. Br. 12, cannot be squared with the plain language of SHVIA.

governed not by *Rust*, but by the cases holding that government cannot condition a particular license on the licensee's accepting a restriction on its editorial discretion or free speech rights. *See generally Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 559 (1995).

Indeed, this Court's decision less than a month ago in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), clearly demonstrates the flaw in respondents' logic. In *Thompson*, Congress had the unquestioned power to prohibit pharmacists from compounding drugs – just as Congress has the unquestioned power in this case, through copyright law, to prevent petitioners from carrying all local television stations. Yet the Court never considered forgoing First Amendment analysis of the ban on advertising compounding services even though the restriction upon pharmacists' speech was merely a limitation upon the grant of "an enormously valuable and extraordinary benefit in the form of an exemption from generally applicable" food and drug laws. *See* Fed. Resp. Br. 11 (describing SHVIA's statutory copyright license).

2. This Court held in the *Turner* cases that Congress may restrict speech when necessary to preserve a multiplicity of broadcast stations threatened by the market power and economic incentives of cable operators to deny carriage for anticompetitive reasons. This case presents the question whether the same result obtains in the absence of the market dysfunction that drove the decision in *Turner*.[2]

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[2] Respondents briefly argue that this question was in fact resolved by the majority in *Turner II*, *see* Fed. Resp. Br. 17-18; NAB Resp. Br. 17-18, but as we have already demonstrated, *see* Pet. 19-20, this contention is without merit. Only Justice Breyer was willing to uphold the must-carry obligation without regard to "[w]hether or not the statute does or does not sensibly compensate for some significant market defect." 520 U.S. at 226 (Breyer, J., concurring in part). No other Justice endorsed that view.

Five Justices reached this question in Turner II. The four dissenters concluded that any interest in protecting a multiplicity of broadcast stations, "apart from [a threat of] anticompetitive conduct," is "heavily content based." 520 U.S. at 233 (O'Connor, J., dissenting). Absent market dysfunction, "[m]ust-carry is . . . justified as a way of preserving viewers' access to a Spanish or Chinese language station or of preventing an independent station from adopting a home-shopping format," and thus "should be subject to strict scrutiny, which they surely fail." *Id.* at 234-35 (O'Connor, J., dissenting). Like the dissenters, Justice Breyer disclaimed the "anticompetitive rationale" relied upon by the other four Members of the majority, *id.* at 225 (Breyer, J., concurring in part), but unlike the dissenters, he concluded that advancing the governmental interest in diversity, standing alone, justified the carriage restriction.

Respondents concede that SHVIA's forced-carriage regime was motivated by a desire "to protect less watched, more vulnerable stations." NAB Resp. Br. 22. Nevertheless, they argue that this purpose is not content-based because there is no difference between the content of the programming offered on network affiliates and that offered on less watched stations: "[m]ajor network affiliates and their independent counterparts alike broadcast dramas, situation comedies, and feature films." *Id.* This is equivalent to arguing that there would be no content-based difference drawn by a law distinguishing between "national political parties" and "minor parties" because both offer candidates for office who give public policy speeches. The whole notion that the government has an interest in promoting a "multiplicity" of viewpoints rests upon the proposition that the *content* of the "diverse" sources of programming that would be lost without forced-carriage is indeed "diverse," or *different*.

In *Turner I*, the Court held that cable must-carry was not subject to strict scrutiny only because Congress had an additional, overarching purpose – namely, to correct the market dysfunction flowing from cable's anticompetitive power. *See, e.g.*, 512 U.S. at 649 ("Congress designed the must-carry provisions not to promote speech of a particular content, but

to prevent cable operators from exploiting their economic power to the detriment of broadcasters"). The Court emphasized that the cable must-carry rule corrected this market dysfunction by discriminating between mediums – in favor of *broadcast stations* and against anticompetitive *cable stations*. The analysis would have been very different had the forced-carriage rule discriminated between different speakers in the same medium solely in order to equalize the power of diverse voices in the marketplace. It was on this basis that the Court distinguished *Buckley*: because the restriction there "was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Id.* at 658.

Here, the speaker-based discrimination is analogous to that in *Buckley*, and distinct from that in *Turner*. SHVIA's forced-carriage rule is not intended to correct a market dysfunction by favoring one medium (broadcast) over another (cable), as was the case in *Turner*, but rather is designed to promote *independent broadcasters* at the expense of *network affiliate broadcasters* in what would otherwise be a properly functioning marketplace of ideas. And while respondents argue that SHVIA's forced-carriage rule does not depend upon the *particular* content aired on any *particular* station, Fed. Resp. Br. 13, this is no different from the fact that the expenditure limits at issue in *Buckley* did not depend upon the *particular* speech of *particular* wealthy individuals.[3]

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[3] Respondents make this point in an attempt to distinguish the "speech-trigger" in this case from that struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Turner I*, the Court distinguished *Miami Herald* by pointing out that the cable must-carry rule did not arise "by reason of the . . . *stations* the cable operator has selected or will select." 512 U.S. at 644 (emphasis added). SHVIA falls on the *Miami Herald* side of this line because its forced-carriage rule is triggered by a satellite carrier's decision to carry a broadcast station in a given market. As the discussion in the text demonstrates, it does not matter that the speech-trigger in SHVIA is indifferent to the content of

3. Respondents do not deny that the SHVIA is not "justified by the special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661. Rather, they attempt to avoid the constitutional peril arising from that fact by claiming that SHVIA furthers the other two of the three "interrelated" interests relied upon in *Turner* – preserving free television and promoting a multiplicity of voices. Even if this Court were to hold, for the first time, that such interests justify restrictions on speech absent market dysfunction, respondents cannot explain how they could be advanced here. It is undisputed that satellite does not pose a threat to the "preservation" of even a single broadcast station, so that the interest of preserving free television simply cannot be served by SHVIA's forced-carriage as it was by cable must-carry. *Cf. Turner I*, 512 U.S. at 666 and *Turner II*, 520 U.S. at 195 (holding that the government must show that "significant numbers" of stations would fail absent must-carry). Respondents likewise do not deny that the Fourth Circuit circumvented this shortcoming in the government's case by refusing to apply "*Turner II*'s substantial deterioration standard," holding that it "does not work here . . . ." App. at 45a. But as this Court held last month, the government bears the burden of demonstrating that its restrictions on speech are actually necessary to advance the interest it seeks to achieve. "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson*, 122 S. Ct. at 1507.

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the station chosen (just as the restriction in *Buckley* was indifferent to the content of the speech of the wealthy). SHVIA was clearly designed to ensure that whenever a satellite company chose to carry a station that by definition is "popular," it would also be required to carry *all* "unpopular stations" offered in that local market.

Instead, respondents argue that the "cumulative impact" of cable and satellite poses a "significantly *greater* threat to free broadcast television." Fed. Resp. Br. 18; NAB Resp. Br. 23-24. Remarkably, respondents advance this argument without bothering to acknowledge, much less address, the wholly unprecedented nature of justifying imposition of a speech restriction on one industry by "attributing" the findings underlying a *separate* statute regulating speech in a *separate* medium. *See* Pet. 26-30. It will *always* be possible to "lump" together one group of speakers in a particular marketplace so as to demonstrate that those speakers, when viewed as a whole, threaten to "crowd out" the losers in that marketplace. If the "cumulative impact" argument is accepted, this Court's insistence upon narrow tailoring will be rendered meaningless, and any speaker in any market can be forced "to carry" the speech of the less popular "losers" in that market.

Second, respondents argue that Congress may justify restrictions on speech whenever they "minimize the unintended, disruptive effects of" its own regulation of the television marketplace. Fed. Resp. Br. 16 (quoting Pet. App. 51a). As an initial matter, there is no indication whatever that Congress sought to advance this supposed interest with the "carry-all" restriction on petitioners' speech. *See, e.g., Thompson*, 122 S. Ct. at 1507 ("we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational").[4] In any event, even

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[4] Respondents elsewhere cite a passage from the Conference Report referring to Congress' interest in "ensur[ing] that satellite would be an 'effective competitor' to cable." Fed. Resp. Br. 19. But the cited portion of the Report addressed only the statutory copyright license granted to satellite carriers to enable them to compete with cable operators; the Committee discussed the "carry-all" condition several pages later, and in the course of that discussion made no mention of imposing the carriage restriction in order to prevent satellite from obtaining a competitive advantage over cable. *See* App. 361a-63a.

if this interest were not merely a post hoc rationalization, the notion that Congress may restrict speech in order to counteract the natural functioning of the marketplace of speech whenever its own regulation has an impact on that market is breathtaking. The Solicitor General's unprecedented submission in this regard would grant government *carte blanche* to impose speech restrictions, for little that government does has *no* impact upon the functioning of speech marketplaces. This Court has never hinted that the First Amendment would countenance this sweeping new authority.

Respondents also seek to justify burdening satellite with a forced-carriage regime, lest satellite obtain "terms of competition that are significantly more advantageous than those offered to cable operators." Fed. Resp. Br. 19. But whenever SHVIA's legislative history refers to promoting competition or leveling the playing field, it does so solely with reference to its desire to *assist the satellite industry* to compete against the monopolistic power of cable by granting the statutory copyright license. *See* Pet. 27 n.9. Moreover, as the Court of Appeals acknowledged, App. 23a-24a, SHVIA's forced-carriage provision, unlike the Cable Act, effectively *excludes* satellite carrier from many playing fields by limiting the number of markets that satellite may serve.

4. The Solicitor General argues that "the courts could not give petitioners the relief that they ultimately seek" because the "carry-all" condition imposed in the Communications Act of 1934, 47 U.S.C. § 338, is not severable from statutory copyright license granted in the Copyright Act, 17 U.S.C. § 122. Fed. Resp. Br. 19. Both the premise and the conclusion are wrong. As to the premise, SHVIA enacted the statutory license and the forced-carriage rule by amending two separate statutes, appearing in two different Titles of the U.S. Code, *each of which* contains an explicit severability clause. *See* 47 U.S.C. § 608; Pub. L. No. 94-553, § 115, 90 Stat. 2541, 2602; *Reno v. ACLU*, 521 U.S. 844, 882-83 (1997). As to the conclusion, even if the forced-carriage requirement were not severable, the federal courts

would in no way be disabled from granting petitioners the relief they seek: a declaration that the carry-all restriction on their speech violates the First Amendment and an injunction against its enforcement. This Court granted this relief in analogous circumstances in *Thompson* even though the issue of severability had been finally resolved against plaintiffs. 122 S. Ct. at 1503.

5. There is no dispute that this case presents the only opportunity this Court is likely ever to have to review SHVIA's forced-carriage requirement, for the entire satellite television industry nationwide is bound by the judgment below. Respondents' implicit suggestion that this Court await a circuit split on the issue, *see* NAB Resp. Br. 15-17, is therefore tantamount to asking the Court to defer the Judicial Department's last word on the constitutionality of SHVIA to the Fourth Circuit. We respectfully submit that where Congress has claimed the power to restrict speech in circumstances significantly beyond what this Court authorized in the *Turner* cases, it is for this Court alone to determine whether its Act comports with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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